Neutral Citation Number: [2018] EWHC 3308 (Ch) Case No: BL-2017-000665

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
7 Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 04/12/2018

Before :

THE HONOURABLE MR JUSTICE FANCOURT

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Between :

PJSC COMMERCIAL BANK PRIVATBANK	**Claimant**
- and -	
(1) IGOR VALERYEVICH KOLOMOISKY **(2) GENNADIY BORISOVICH BOGOLYUBOV** **(3) TEAMTREND LIMITED** **(4) TRADE POINT AGRO LIMITED** **(5) COLLYER LIMITED** **(6) ROSSYN INVESTING CORP** **(7) MILBERT VENTURES INC** **(8) ZAO UKRTRANSITSERVICE LTD**	**Defendants**

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Stephen Smith QC, Tim Akkouh, Christopher Lloyd and Emma Williams (instructed by **Hogan Lovells International LLP**) for the **Claimant**
Mark Howard QC, Michael Bools QC, Alec Haydon and Ben Woolgar (instructed by Fieldfisher LLP) for the **First Defendant**
Ali Malek QC and Matthew Parker (instructed by **Skadden, Arps, Slate, Meagher & Flom (UK) LLP**) for the **Second Defendant**
Sonia Tolaney QC, Thomas Plewman QC and Marc Delehanty (instructed by **Pinsent Masons LLP**) for the **Third to Eighth Defendants**

Hearing dates: 25, 26, 27, 30, 31 July 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

Mr Justice Fancourt:

This judgment comprises the following parts:

I. Introduction

1. On 19 December 2017, Nugee J. made various orders upon without notice applications of the Claimant ("the Bank"). These included a worldwide freezing order up to US$2.6 billion against each of the Defendants (additional to sums in other Commercial Court proceedings, in the case of the First and Second Defendants); an order that each of the Defendants disclose assets held or controlled by them anywhere in the world of a value in excess of £25,000; orders for alternative service of the applications, claim form and orders on the First to Fifth Defendants, and permission to serve the application, claim form and orders on the Sixth to Eighth Defendants out of the jurisdiction.

2. The First and Second Defendants, Mr Kolomoisky and Mr Bogolyubov, were the majority shareholders of the Bank prior to its nationalisation in Ukraine in December 2016. Each of them is a wealthy Ukrainian businessman who also has Cypriot and Israeli nationality. At the date of the orders of Nugee J. both of them were domiciled in Switzerland.

3. The Third to Fifth Defendants ("the English Defendants") are limited companies registered in England and Wales. They are wholly-owned subsidiaries of other non-UK companies. The Sixth to Eighth Defendants ("the BVI Defendants") are companies incorporated in the British Virgin Islands. It is the Bank's case that the English and BVI Defendants were some of numerous corporations used by the First and Second Defendants to perpetrate an extensive fraud on the Bank and that each of the English and BVI Defendants is ultimately controlled by the First and Second Defendants, or by persons who act in accordance with their instructions.

4. The Bank's claim is quantified at US$1,911,877,385 plus interest. The claim is brought against the First and Second Defendants on the basis that they procured the misappropriation of that sum from the Bank, with the unlawful intention of injuring the Bank and benefitting themselves. The Bank's claim against the English and BVI

Defendants is pleaded on two bases. First, that they procured or assisted in the misappropriation of the aforesaid sum and its subsequent concealment, with the unlawful intention of injuring the Bank and benefitting the First and Second Defendants. Second, that each of the English and BVI Defendants was unjustly enriched at the Bank's expense, in that each of them acquired part of the aforesaid sum of money without justification and at the expense of the Bank and so are liable to compensate the Bank in a proportionate amount (plus interest).

5. The first reaction of the First and Second Defendants was to apply to the court to vary the terms on which the worldwide freezing order required them to make disclosure of their assets. This application had the effect that they were only obliged to disclose assets exceeding £1,000,000 in value and that any assets located in Ukraine or Russia were able to be disclosed on a confidential basis. Thereafter, the applications came before Roth J. on 15 January 2018, who by consent continued the orders as previously made (and varied) but without prejudice to the Defendants' rights to challenge the jurisdiction of the English courts and to seek to set aside the worldwide freezing order. Thereafter, each of the Defendants complied with the orders for disclosure.

6. On 16 February 2018, the English Defendants applied for declarations that the Court had no jurisdiction, or alternatively should not exercise its jurisdiction, for orders setting aside the claim form and the worldwide freezing order made against them, or alternatively for a stay of proceedings against them. On the same date, the BVI Defendants applied for an order that the claim form had not been validly served and/or that the court had no jurisdiction or should not exercise its jurisdiction, and for further orders setting aside the permission given to serve the claim form out of the jurisdiction and the worldwide freezing orders, and alternatively for a stay of the proceedings against them. On 2 March 2018, the English and BVI Defendants further applied to discharge or vary the worldwide freezing orders on grounds that the Bank had no good arguable case against them, alternatively that the English Defendants had no or negligible assets and there was no real risk of dissipation of assets by the English or BVI Defendants, and on the grounds of material non-disclosure and misleading of the court by the Bank on the without notice application.

7. On 9 March 2018, each of the First and Second Defendants applied to set aside the worldwide freezing order against them and for a determination that they cannot be sued in England and Wales under the terms of the Lugano Convention 2007, alternatively for a stay of the proceedings pursuant to EU Regulation No.1215/2012 (the recast Brussels Regulation) and/or the Lugano Convention.

8. These are the various applications that I heard between 23 and 31 July 2018. I had to consider the original evidence sworn in support of the application for a freezing injunction and the claim form, several rounds of very detailed evidence of the solicitors acting for each of the Defendants (and one witness statement from each of the First and Second Defendants), evidence in response from the Bank's solicitors, further responsive and additional evidence on behalf of all of the parties, and several rounds of expert opinion evidence from Ukrainian lawyers for all of the parties on matters of the substantive law of Ukraine and the operation of the judicial system in Ukraine.

9. I was about to circulate my draft judgment in October 2018 when the Bank served further evidence relating to potentially material developments in litigation in Ukraine involving all the Defendants. I allowed further evidence and submissions to be addressed to those developments.

II. The Issues for Determination

10. Against that brief recital of the background to the hearing, the issues that I have to determine are the following.

11. First, whether the Bank has a good arguable case (as pleaded in the particulars of claim) that loss of US$1.91 billion plus interest was caused to it by the alleged fraud of the Defendants. For the purposes of these applications, all Defendants do not dispute that there is a good arguable case that US$248 million of loss was caused to the Bank by the pleaded fraud, but they deny any good arguable case of loss in excess of that amount.

12. Second, whether the worldwide freezing orders should be set aside in whole or in part for non-disclosure or misrepresentation, or reduced to or reimposed in a lesser maximum sum than the current maximum sum of US$2.6 billion.

13. Third, whether the Court has jurisdiction over the First and Second Defendants under Article 6.1 of the Lugano Convention by reason of the claim against the English Defendants as "anchor defendants". Although the claims as pleaded against the First and Second Defendants and the English Defendants are closely connected, the particular issue is whether the claim against the English Defendants was brought with the sole object of removing the First and Second Defendants from Swiss jurisdiction and so was an abuse of Article 6.

14. Fourth, if there is jurisdiction against the First and Second Defendants, whether the claims against them and the English Defendants should be stayed on grounds of *lis pendens* in Ukraine. This raises separate questions:

    a) Whether the Court has power to stay proceedings against the First and Second Defendants (where jurisdiction only exists (if at all) under the Lugano Convention) in favour of proceedings in a non-Convention state, namely Ukraine. The First and Second Defendants argue that Article 28 of the Convention, which empowers a Convention State to stay proceedings on grounds of *lis pendens* in another Convention State, should be applied by analogy (or "reflexively") in favour of proceedings in a non-Convention State.

    b) Whether the Court should stay proceedings against the English Defendants (who are sued in accordance with Article 4 of the recast Brussels Regulation) in favour of proceedings in Ukraine. The issue here is as to the meaning, effect and application of Article 34 of the Regulation, which as from 10 January 2015 conferred a power on EU States in defined circumstances to stay proceedings in favour of proceedings in a non-Member State ("a third State").

15. Fifth, to the extent that the Court has power to stay on grounds of *lis pendens* in Ukraine, whether it should exercise that power given the nature of the proceedings in Ukraine, the degree of connection between the Bank's claim and Ukraine and the risk of irreconcilable judgments if no stay is granted.

16. Sixth, whether the Court should set aside the permission granted without notice to serve the claim form on the BVI Defendants out of the jurisdiction, or alternatively stay the proceedings against the BVI Defendants on grounds of *forum non conveniens*.

III. The Bank's Good Arguable Case

17. The English Defendants and the BVI Defendants are sued on the following basis. It is alleged that the English Defendants received in their bank accounts about US$1.8 billion of the Bank's money, which had been drawn down by up to forty-six different corporate borrowers ("the Ukrainian borrowers") pursuant to loan agreements identified in the particulars of claim ("the Relevant Loans"). The BVI Defendants are alleged to have similarly received about US$100,000,000 from Relevant Loans. These funds were paid to them under an allegedly fraudulent scheme, whereby the English and BVI Defendants and up to thirty other corporate suppliers agreed to supply inordinately large quantities of various commodities to the Ukrainian borrowers.

18. All the suppliers and the borrowers are alleged in fact to be insubstantial companies ultimately controlled by the First and Second Defendants, or by persons taking their instructions from them. The funds passing to the English and BVI Defendants were prepayments of virtually the whole of the purchase price for the commodities under the supply agreements. They were paid sometimes months or even up to a year before the commodities were to be supplied. As security for the prepayments, the English and BVI Defendants (and other suppliers) purported to pledge the products to be supplied; but there were no such products and they never were supplied. The pledges were therefore worthless and the $1.91 billion of prepayments were not repaid by the English and BVI Defendants to the Ukrainian borrowers.

19. The impression was thereby given that the money was retained by the English and BVI Defendants or by others associated with them and that their prepayments were the only ones not repaid to the Ukrainian borrowers.

20. The First and Second Defendants have been sued only to the same extent as the English and BVI Defendants, that is to say for about US$1.91 billion, even though public allegations have been made in Ukraine that the total extent of the fraud perpetrated on the Bank is in the region of US$5.5 billion. None of the Ukrainian borrowers has been sued by the Bank. They are all Ukrainian companies and have no valuable assets. None of the other suppliers who received sums from time to time under Relevant Loans has been sued by the Bank.

21. It is accepted by the Bank that the governing law for its claims against all the Defendants is Ukrainian law. The claim is put on the basis of joint and several liability for infringement of various tort provisions of the Ukrainian Civil Code; and compensation against the First and Second Defendants under the Ukrainian joint stock company law and Ukrainian law on banks and banking activity. There is a secondary claim against the English and BVI Defendants under the unjust enrichment provisions of the Ukrainian Civil Code.

22. The fraud is alleged to have been carried out in Ukraine. To the extent that non-Ukrainian companies were involved, they all had accounts at the Bank, either in Ukraine or in Cyprus, or both. Apart from the fact that the English Defendants are limited companies registered in England and Wales, it is accepted by the Bank that its claim has no connection with England and Wales. Of one hundred and ninety-two companies in various countries that were involved as borrowers, suppliers or otherwise in connection with the alleged fraud, only the three English Defendants are English companies. The fraudulent scheme, involving lending of substantial sums of money to insubstantial Ukrainian companies and prepayments under sham supply contracts, is alleged to have been run by the First and Second Defendants and staff at the Bank personally answerable to them for a period of up to eight years, but the English Defendants were only involved in it between May and September 2014.

23. All the Defendants stress that the Bank's claim is that specific amounts of money drawn down under identified Relevant Loans have been misappropriated by them. Drawdowns by the forty-six Ukrainian borrowers, on dates in schedules prepared on behalf of the Bank, are alleged to have been paid to the English and BVI Defendants pursuant to identified supply agreements. The case against the Defendants is not pleaded on the basis that they all conspired together with the borrowers and other suppliers to defraud the Bank of money, or on the basis that identifiable borrowers controlled by the First and Second Defendants have not repaid their loans. The Defendants suggest that that is surprising, given the general complaint by the Bank that the First and Second Defendants embezzled US$5.5 billion. Instead, the Bank deliberately claims in relation to only about US$1.91 billion of identified funds that reached the English and BVI Defendants' bank accounts between May and August 2014 and were not repaid to the counterparty Ukrainian borrowers when the supply agreements were not performed.

24. Accordingly, say the Defendants, it is not sufficient for the Bank to prove a good arguable case that there was a fraud involving all the Defendants that resulted in the Bank losing US$1.91 billion. The Bank must establish a good arguable case that US$1.91 billion of funds drawn down under the Relevant Loans came into the English and BVI Defendants' accounts pursuant to a fraudulent scheme and caused the Bank loss as a result.

25. There is no difficulty with the Bank's proving a good arguable case of a fraudulent scheme. While it is not part of my function at this stage to make final factual findings about the scheme, the evidence is nevertheless strongly indicative of an elaborate fraud perpetrated by someone, allied to an attempt to conceal from any auditor or regulator the existence of bad debts on the Bank's books, and money laundering on a vast scale. I have been shown (as was Nugee J) documents that demonstrate clearly that the supply agreements made between the English and BVI Defendants and other suppliers and pledges in favour of the Bank were shams. The suppliers were in almost all cases non-trading companies; none had substantial assets or any track record in delivering large quantities of commodities. Where the suppliers had any identified business, this was often unconnected with the commodities that they had agreed to supply. The quantities of commodities were, in some cases, large multiples of the total annual Ukrainian imports in the relevant commodity, deliverable in one instalment within months of the agreement. The Ukrainian borrowers were similarly companies with no commercial track record or any substantial assets. The supply agreements provided for prepayment of most of the purchase price ahead of supply, and there existed in the case of each such agreement a second agreement in writing, presumably intended for the files of the Bank, purportedly showing that the purchase price would only be paid on or after delivery of the commodities.

26. In short, the supply agreements could not have been performed and the obvious inference is that there was no intention that they would be. They were used as a deceptive basis on which to justify very large of sums of money flowing out of the Bank. However – and this is central to the Defendants' defence on quantum – in very many cases the same monies that were drawn down and prepaid to a supplier were returned to the borrower and the Bank, often on the very same day, before a later drawdown under the same or a different Relevant Loan and a prepayment to another supplier. There is a highly complex network of multiple loans and prepayments to suppliers, payments on to other offshore companies, and repayments by suppliers or others to the borrowers and then (in some cases) by borrowers to the Bank. The artificial complexity of this is itself indicative of a fraudulent scheme.

27. The scheme that the Bank described to Nugee J. was one in which US$1.91 billion of funds were drawn down and prepaid to a supplier; then repaid to the borrower within ninety days in order to comply with foreign exchange controls in Ukraine, then repeated, and then returned by way of a new prepayment to one of the English or BVI Defendants at some time between May and September 2014. So, the very monies that were drawn down were held for up to ninety days by a supplier, then repaid to the borrower, and the same monies again paid (after in some cases several further 90-day loops) to one of the relevant Defendants. At that stage, the Bank's case was that these monies were transferred by the English and BVI Defendants to other, unidentified companies and dealt with in such a way that it was impossible to identify what had happened to the particular funds.

28. The relevant parts of the particulars of claim, which were shown to Nugee J, are the following:

> "Between April 2013 and August 2014, the Bank made a series of purported loans to forty-six Ukrainian borrowers ("the Borrowers" and "Relevant Loans"). Particulars of the identities of the Borrowers, the dates of the Relevant Loans and the amounts purportedly lent thereunder are contained in Schedule 1 hereto." (Para 16)

> "Between May and August 2014, each of the Borrowers entered into at least one purported supply contract pursuant to which the relevant Borrower agreed to purchase certain industrial equipment or commodities from one of the Defendant Suppliers (The "Supply Agreements"). In total fifty-four Relevant Supply Agreements were entered into (the "Relevant Supply Agreements")." (Para 20)

> "In relation to the Relevant Supply Agreements entered into by each of the Defendant Suppliers the Borrowers agreed to make, and did in fact make, unreturned pre-payments in an aggregate amount of c. US$ 1.91 billion to companies with the characteristics described in the preceding paragraph without the provision of any security…" (Para 25(a)(i))

> "The Relevant Loan Agreements and the 2014 Pledges and the Relevant Supply Agreements and Loan File Supply Agreements, collectively the "2014 Agreements", are each shams and/or transactions that are contrary to Ukrainian public policy, in that they were not intended to create enforceable commercial obligations but were put in place on the instructions of Messrs Kolomoisky and Bogolyubov to hide their misappropriation of assets from the Bank." (Para 32)

"Messrs Kolomoisky and Bogolyubov misappropriated $1,911,877,385 of the Bank's moneys in the manner described in paragraph 14-32 above." (Para 52(1))

"The Defendant Suppliers procured and/or assisted in the misappropriation of $1,911,877,385 from the Bank and procured and/or assisted in the subsequent concealment of the same. For the reasons particularised below, the actions decisions and/or omissions of the Defendant Suppliers were unlawful because they deprived the Bank of its moneys in a manner not provided for by the Constitution or other laws of Ukraine (contrary to Article 3(1)(2) of the Civil Code) and acted in a manner that violated the Bank's rights and with the intention to injure the Bank (contrary to Article 13 of the Civil Code).

Particulars

(a) The Defendant Suppliers assisted Messrs Kolomoisky and Bogolyubov in misappropriating $1,911,877,385 of the Bank's monies in the manner described in paragraphs 14-32 above. The said paragraphs are repeated. The knowledge and intentions of Messrs Kolomoisky and Bogolyubov are to be attributed to the Defendant Suppliers by reason of their ultimate ownership and/or control over the Defendant Suppliers…" (Para 54)

"In the premises the actions of Messrs Kolomoisky and Bogolyubov and each of the Defendant Suppliers were interconnected, cumulative and carried out with a unity of intent such that each of the Defendant Suppliers is liable to compensate the Bank for the entirety of the loss and damage caused by the Misappropriation pursuant to Articles 22, 1166, 1190 and 1192 of the Civil Code. The quantum of the said loss and damage is addressed in section F. Alternatively, the Defendant Suppliers are each liable to compensate the Bank for the funds they received pursuant to the Relevant Supply Agreements." (Para 55)

"Each of the Defendant Suppliers was unjustly enriched at the Bank's expense by reason of their involvement in the Misappropriation:

(a) Each Defendant Supplier acquired property in the form of pre-payments under the Relevant Supply Agreements. None of the Defendant Suppliers have either (i) returned the said pre-payment or (ii) complied with their purported obligations under the Relevant Supply Agreements.

> (b) The said acquisition of property came at the expense of the Bank, in that the said moneys were advanced by the Bank to the Borrowers pursuant to agreements which are shams and/or contrary to public policy and which are, accordingly, void.
>
> (c) The said acquisition of property was without sufficient legal grounds because the Relevant Supply Agreements were shams and/or documents that are contrary to public policy and which are, accordingly, void." (Para 58)
>
> "There has been no repayment of any of the funds transferred out of the Bank's control pursuant to the Misappropriation or of any interest purportedly due under the Relevant Loans." (Para 62)

29. Accordingly, the particulars of the Bank's claim alleged identified monies drawn down under particular loan agreements, having been received by the English and BVI Defendants pursuant to a fraudulent scheme devised by the First and Second Defendants and not repaid by them. The impression is given that the English and BVI Defendants received the whole of the monies that are the subject of the allegations against the First and Second Defendants and either retained them or dealt with them as instructed by the First and Second Defendants. It is implicit in the claim based on unjust enrichment that the English and BVI Defendants benefited from receipt of the monies drawn down under the Relevant Loans. The English and BVI Defendants are therefore central to the allegedly fraudulent scheme described in the particulars of claim and were recipients of the sums drawn down and directly benefited, subject only to their ultimate control by the First and Second Defendants.

30. The evidence on which the Bank originally relied was contained in the first affidavit of Mr Richard Ian Lewis sworn on 15 December 2017. It is one hundred and sixteen pages long, contains considerable detail and refers to voluminous exhibits. Mr Lewis describes a loan recycling scheme that investigations at the Bank had discovered. He described this as involving new loans used to repay older loans so that the extent of the bad lending in the Bank's loan portfolio would not come to light. He says that it appears to have involved so many payments in such compressed periods that experts had suggested that the payments are likely to have involved a computer-generated algorithm (para 19). He states in terms that the Bank's claims relate to the sum of just over US$1.9 billion that was lent to forty-six Ukrainian borrowers between 2013 and 2014 and paid to the English and BVI Defendants, pursuant to the Supply Agreements. He asserts that the Ukrainian borrowers and the Defendant suppliers (including the English and BVI Defendants) are owned by the First and Second Defendants. It was therefore clear at an early stage that the real, substantial Defendants to the claim are the First and Second Defendants. Later in the affidavit he explains that the Relevant Loans were agreed (as facilities) between 3 April 2013 and 21 August 2014 (para 92) and that the Borrowers used funds drawn down to make payments to thirty-five Suppliers (para 93). There are then the following two paragraphs:

> "Until 28 May 2014, seemingly constrained by Ukrainian currency control regulations (which imposed significant restrictions on funds leaving Ukraine unless in return for goods or services, as I will describe in more detail below), the payments

> made to the Suppliers under the Supply Agreements were returned to the Borrowers approximately every ninety days (as shown in Schedule 2). In most cases, however, on the same day funds were returned, they were paid out again, in slightly different amounts, under different Supply Agreements but still to one or more of the Suppliers.
>
> The effect of the above was that, until 28 May 2014, no payments appear to have been retained by any of the thirty-five Suppliers to whom they have been made. But, over the course of just over three months from 28 May 2014 to 1 September 2014, a total of c. US$ 1.91 billion was paid out to just six of the Suppliers (i.e. the Defendant Suppliers, being the Third to Eighth Defendants) and was not returned to the Borrowers (the "Unreturned Pre-payments"). The fifty-four Supply Agreements under which Unreturned Pre-payments were made are at pages 5145-5697, and the details of such agreements are set out in Schedule 2 to the Bank's draft Particulars of Claim."

31. The picture was therefore that money drawn down under the Relevant Loans was not repaid to the Bank, but the funds continued to pass between the borrowers and the suppliers (repeatedly) until, as part of this arrangement, the same monies were transferred to the English and BVI Defendants between May and September 2014, but this time were not returned to the Ukrainian borrowers. At para 100, Mr Lewis says that the earlier prepayments were returned in full to the Ukrainian borrowers' accounts, with the clear implication that none of these monies were repaid to the Bank. He then refers to a Schedule 3, which purports to identify the use of the funds drawn down under Relevant Loans, identifying all the advances by way of prepayments and/or earlier returns of prepayments by each of the English and BVI Defendants. The total amount of Unreturned Prepayments is thereby shown to amount to US$1,911,877,385. This evidence strongly implies that the same monies were repeatedly recycled between Ukrainian borrowers and the English and BVI Defendants in 2013/2014 and were either repaid by each supplier to the borrower who had prepaid the funds or were (ultimately) retained by the English and BVI Defendants.

32. Mr Lewis sets out in his affidavit what the Bank has been able to find out about each of the corporate Defendants. He points to anomalies between account fact sheets that the Bank has for each company and the "non-trading" annual returns and extremely low net asset position of the English Defendants.

33. The Bank's case as to the misappropriation of the Relevant Loans depends on showing that the funds drawn down under the Relevant Loans were continuously passing between Borrowers and Suppliers, so that the same funds were eventually prepaid to the English and BVI Defendants in the summer of 2014. This is the description that Mr Lewis gives at para 271:

> "Transactional data extracted from the Bank demonstrates that pre-payments were made by bank transfer from the account of a Borrower to the account of a Supplier, purportedly in accordance with the terms of one of the Supply Agreements. In each case, however, almost exactly ninety days after the pre-payment was made to the Supplier, the money was returned to the Borrower,

> with the narrative description that accompanied that later transfer stating that it was a "*return of pre-payment*" and again cited the Supply Agreement number under which the pre-payment was originally made."

At para 273, he continues:

> "…The round-tripping scheme continued in much the same way with large amounts of money moving back and forth between the Borrowers and Suppliers until 28 May 2014, when, as I have explained above, over a period of approximately three months approximately US$ 1.9 billion was paid to the Defendant Suppliers and was not returned. That misappropriation forms the basis of the Bank's claims in these proceedings."

The implication is that the monies in question remained with the English and BVI Defendants, although footnote 82 in para 378 of the affidavit states that the Bank has some information about what happened to the monies.

34. Mr Lewis exhibits at Schedule 6 charts depicting the movement of monies in connection with the Relevant Loans. These are referred to as "i2" charts. They comprise fifty-four pages of highly complex, diagrammatic representations of the flow of money (as depicted by the Bank) between it, the Ukrainian borrowers and the suppliers, including the English and BVI Defendants. In A4 format these are virtually impossible to read. For the purposes of the argument, I was presented with a number of these i2 charts in A2 format, which made them legible; but without very clear and detailed exposition and cross-reference to other documents in evidence, it is extremely difficult to make sense of them. With the benefit of the document in that format and careful explanation, it is possible to see that the i2 Charts do show that some of the monies drawn down and circulating return not just to the original borrower but to the Bank itself.

35. Mr Lewis summarises the Bank's claim against the Defendants as being brought against them jointly and severally under the general tort rule of Ukrainian law, which imposes a general liability to indemnify those who have been caused harm by unlawful conduct. He states that the Bank also has:

> "claims against the Defendant Suppliers in unjust enrichment, both because of their acquiring c.$1.9 billion extracted from the Bank via the Lending Scheme without legal grounds, and for later retaining this amount without legal grounds."

On the question of why injunctive relief should be granted without notice, Mr Lewis contended (para 377) that, despite the First and Second Defendant's belief that the Bank's claims have no real or tangible connection with England and Wales, they were not aware that the Bank had discovered that around US$1.8 billion of stolen funds was transferred to three English companies. He asserts that it was possible that significant funds remain under the control of those companies, or of companies or of individuals connected with them. He said the:

> "Bank fears that any funds that do remain under the control of the Defendant suppliers and/or those connected to them, would be moved in such a way as to make them more difficult to freeze".

Mr Lewis is therefore asserting not just that the three English Defendants were central to the fraud but that, as recipients of the stolen money, they might well have assets that were recoverable pursuant to proceedings brought in England and Wales.

36. It is at that point in the affidavit of Mr Lewis that footnote 82 appears. As one in a long sequence of detailed footnotes, it is not by its nature something that might attract attention. The footnote states in quite small but legible font size:

> "As is explained below the Bank has attempted to discover what happened to the funds paid to the Defendant Suppliers, and has some information in that regard as the money was paid to them in Privat Bank Cyprus accounts. It appears, however, that the money was split up and paid on quickly and to a significant number of further companies in such a way that it has not been possible to discover where it now resides, but it is anticipated that one or more of the Defendants will know, and the grant of freezing and disclosure orders – before there is time to dissipate the money any further – will provide the Bank with the best chance of securing the funds."

There is, in fact, no further explanation of this in the remainder of the affidavit, or elsewhere in the evidence that was put before Nugee J. Although the Bank was able to say exactly where and when the US$1.91 billion of monies left the English and BVI Defendants' accounts – because those accounts were held with the Bank in Cyprus – it did not do so. In fact, all the monies paid to the English Defendants were immediately transferred on to six off-shore companies. The Bank later explained that it did not include that information, or seek to follow the funds received by the English Defendants, because its claim was not seeking a tracing remedy, nor was it in any sense a proprietary claim. All that mattered, for purposes of its claim, was that the English and BVI Defendants were complicit in the fraud and had received the US$1.9 billion for a time, even if it was a very short time indeed.

37. The initial evidence on behalf of the First Defendant in response to the evidence of Mr Lewis is contained in the second witness statement of Andrew Noel Lafferty dated 9 March 2018. The Second Defendant has relied upon the evidence filed on behalf of the First Defendant in this regard. The English and BVI Defendants have filed their own evidence in response to Mr Lewis's evidence in the form of the second witness statement of Stuart McNeill dated 2 March 2018 and shorter witness statements made by a director of each of the English and BVI Defendants. This evidence provoked a further very lengthy (one hundred and fifty-three pages) third witness statement of Mr Lewis, which in turn gave rise to further responsive evidence from Messrs Lafferty and McNeill. The evidence filed on behalf of the Defendants presents a very different picture in relation to the Relevant Loans and the role played by the English and BVI Defendants from the evidence of Mr Lewis. The Defendants' evidence does not, however, seek to explain how the scheme alleged by the Bank to be a fraudulent scheme operated, or why huge amounts of money were repeatedly circulating between the Bank, forty-six Ukrainian borrowers and thirty-five suppliers.

38. The approach of the Defendants has been to start with the Relevant Loans identified in Schedule 1 to the Particulars of Claim. Mr Lafferty has sought to show what happened to all the monies drawn down at any time under the Relevant Loans. He has done so because the Bank's pleaded case is that its loss arose from the misappropriation of funds advanced under the Relevant Loans. In fact, the Bank's case, when properly analysed, relates to losses arising from particular prepayments made with funds *alleged* to have been previously drawn down under the Relevant Loans, but Mr Lafferty has gone

further and sought (with the benefit of work done by expert analysts) to address all drawdowns under the Relevant Loans. These loans were revolving facilities, so they permitted multiple drawdowns on available funds. That explains why, although the Bank's analysis starts with the US$1.91 billion of funds received by the English and BVI Defendants and not repaid by them, the First Defendant's analysis starts with a much larger aggregate sum of US$2.495 billion advanced under the Relevant Loans.

39. In short, the First Defendant's analysts have sought to follow the money drawn down and identify where it went. They have done so by studying the bank statements of the forty-six Ukrainian borrowers and the thirty-five suppliers (including the English and BVI Defendants). The Defendants do not dispute that between May and September 2014 about US$1.91 billion was paid by Ukrainian borrowers to the English and BVI Defendants. But what they have identified is that (as they claim) only about US$559 million of the US$2.5 billion drawn down under the Relevant Loans was not repaid to the Bank, and that of this US$559 million only US$248 million came into the hands of the English and BVI Defendants. Thus, of the US$1.91 billion received by the English and BVI Defendants (and immediately transferred by them into the bank accounts at the Bank of six offshore companies), only US$248 million are funds that were drawn down under the Relevant Loans but never repaid to the Bank before being transferred to the English and BVI Defendants.

40. The Bank criticises the First Defendant's analysis. It says that the schedules produced by Mr Lafferty to demonstrate the conclusions relied upon do not include many relevant payments, including the very prepayments that were made to the English and BVI Defendants between May and September 2014 and which the Bank's analysis shows as not having been "repaid". Accordingly, it says that the First Defendant's analysis is incomplete and flawed. The First Defendant's answer to this is that there is no dispute about the fact that $1.91bn was paid by various Ukrainian borrowers to the English and BVI Defendants between May and September 2014. The relevant questions, they say, are not whether these Defendants received funds in that amount but (i) what part of those monies were funds drawn down under the Relevant Loans and (ii) what happened to the monies that the English and BVI Defendants received during that period (i.e. what proportion of these went back to the Bank). The Defendants' complaint is that the Bank's approach fails to take account of the full picture. If monies reaching the English and BVI Defendants were not derived from the Relevant Loans, the Defendants are entitled to say that the claim in respect of such sums does not fall within the Bank's pleaded case. If the monies reaching the English and BVI Defendants were repaid to the Bank by the Ukrainian borrowers, no loss was caused to the Bank.

41. The Defendants emphasise that it is no accident that the Bank has pleaded its claim the way that it has. Instead of pleading a claim for damages for a US$5.5bn fraud, the Bank has deliberately focused on the claimed non-repayment of US$1.91 billion received by the English and BVI Defendants. Were this focus an error in pleading the Bank's case, it might be justified in saying that nevertheless there is strong evidence of a fraudulent scheme involving all the Defendants (and others) of at least US$1.91 billion. But there is no suggestion by the Bank of any pleading mishap. The Bank has sought to defend the basis on which it pleaded its claim and its entitlement to the worldwide freezing order based on that pleaded case and the evidence of Mr Lewis.

42. The Defendants' case is that the claim was pleaded and evidence prepared as a means of establishing jurisdiction to sue the First Defendant and the Second Defendant in London. The natural place for a Ukrainian bank to sue two Ukrainian nationals in respect of a fraud carried out in Ukraine is Ukraine, or if necessary Switzerland, being

the place of their domicile. The Bank could not have sued the First and Second Defendants alone in London. Article 2 of the Lugano Convention provides:

> "1. Subject to the provisions of this Convention, persons domiciled in a State bound by this Convention shall, whatever their nationality, be sued in the courts of that State.
>
> 2. Persons who are not nationals of the State bound by the Convention in which they are domiciled shall be governed by the rules of jurisdiction that are applicable to nationals of that State."

Article 6 provides:

> "A person domiciled in a State bound by this Convention may also be sued:
>
> 1. Where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings;…."

The Bank's only prospect of suing the First and Second Defendants in London was to bring a claim against persons domiciled in England and Wales, i.e. the English Defendants.

43. Accordingly, say the Defendants, the Bank has crafted its claim so that the English Defendants appear to be "central" to the claim for losses of US$1.91 billion (rather than US$5.5 billion) caused to the Bank by a fraudulent scheme. The apparent centrality of the English Defendants (recipients of about US$1.8 billion out of the US$1.91 billion claimed) seems to justify bringing a claim against them, even if they only have very limited tangible assets; and a good claim against these anchor defendants for virtually all of the losses claimed appears to justify the application of Article 6 in the case of the First and Second Defendants. Since the Bank has crafted its claim in that way, the Defendants say that they and the Court should approach the Bank's pleaded claim strictly in accordance with its terms.

44. I will come in Part V of this judgment to the question of whether, as a matter of law and fact, the claim brought against the First and Second Defendants does properly fall within Article 6. Before then, I need to draw some conclusions about the validity of the pleaded claim and about the true nature of the claim made against the English Defendants in particular.

45. The second witness statement of Mr McNeill establishes that in all cases the monies paid to the English and BVI Defendants were paid from a holding account in the Bank's branch in Cyprus, and that in all cases the funds received by the English Defendants were paid out of their accounts with the Bank the same day. The transferees were six companies, including four companies that are alleged by the English Defendants to be their BVI principals. Mr McNeill's evidence also proves that, from 14 July 2014, all the payments out of the English Defendants' bank accounts were on the same day transferred back to the very same holding account in Cyprus from which they had been paid. So far as the BVI Defendants are concerned, the number of payments was much smaller, but each such payment was received from the same holding account in Cyprus

and was paid out by each BVI Defendant on the same day to one of six identified offshore companies.

46. In his second witness statement, Mr Lewis accepts the accuracy of Mr McNeill's evidence as to the immediate payment out of all the monies from the accounts of the English and BVI Defendants. He says that the transferees then mixed the funds received with their own funds, or that in some cases the accounts of the transferees were overdrawn. He identifies Brimmilton Ltd, a BVI company, as the ultimate recipient of many of the funds. Mr Lewis does not attempt to deal with Mr McNeill's evidence as to immediate repayment by the English Defendants of monies received by them after 14 July 2014. He argues that the centrality of the English Defendants is legally irrelevant to the Bank's case, and that where the misappropriated funds ended up was immaterial for the purposes of the Bank's application for a world-wide freezing order.

47. In his third witness statement, Mr Lewis makes clear that the Bank alleges that the monies that were being recycled for (in some cases) up to six years before May 2014 involved all prepayments being repaid by the suppliers within ninety days of receipt. By way of contrast, he says, during the period 28 May to 1 September 2014, US$1.91 billion was paid to the English and BVI Defendants under fifty-four supply agreements that were not repaid. So, the focus of the Bank's case is on there being no identifiable "repayment" by the English and BVI Defendants within ninety days and, by implication, the English and BVI Defendants keeping the funds. He asserts that these prepayments were made using advances under Relevant Loans:

> "As I have explained above, the Bank's case is that the Unreturned Prepayments were made using the Relevant Loans advanced to the Borrowers. I explained the Bank's case in this regard at Paragraph 92 of my first Affidavit. At Paragraph 310 of my first Affidavit I explained that charts which depict movement of monies in connection with the Relevant Loans appeared at Schedule 6 to my first Affidavit (the "**i2 Charts**"). An i2 Chart was produced for each of the Unreturned Pre-payments and those i2 Charts were included in the evidence that was before the court at the without notice hearing on 19 December 2017." (para 55)

Later, he asserts that the i2 charts "comprehensively set out the Bank's case at the 19 December hearing on the use of the Relevant Loans to fund the Unreturned Prepayment" (para 65).

48. At this stage there is a discernible shift in the Bank's argument, in that Mr Lewis (at para 66) focuses not on the use of specific funds drawn down to make the prepayments to the English and BVI Defendants but on those prepayments deriving from funds fraudulently obtained from the Bank generally. Mr Lewis nevertheless asserts that 97.6% of the relevant prepayments were funded by Relevant Loans. However, critically for his argument, this depends on an assumption that each of the previous prepayments to suppliers was repaid using the same monies that were prepaid, so that the same monies drawn down were recycled. For this proposition the Bank relies on the narrative attached to particular transfers, which can be read as implying that the funds were retained by the supplier for 90 days before being repaid.

49. From the evidence that Mr Lafferty exhibits, it is reasonably clear that this assumption is wrongly made: it is clearly demonstrated that the English and BVI Defendants did not keep the prepayments but immediately transferred the funds on and - sometimes

even on the same day – the funds were then returned by the transferee to the borrower and to the Bank. In other cases the funds undertook a more circuitous journey before being repaid to a different Ukrainian borrower and to the Bank.

50. In my judgment, the Bank's case relies heavily on the unjustified assumption that the same funds were used by a supplier to make a repayment of the prepayment ninety days later. But the assumption that the funds remained identifiable in an account of the supplier and were then repaid to the borrower is falsified by the evidence in the Lafferty schedules, which I was taken through in considerable detail, which demonstrates that the funds were not retained by the suppliers. It is by demonstrating, by a tracing process, that funds drawn down under Relevant Loans were repaid to the Bank in this way that the Defendants are able to assert that only $559 million of the total funds drawn down under Relevant Loans were not repaid to the Bank.

51. The Bank of course had the same materials available to it as the Defendants had to carry out this analysis. But it did not seek to identify in the same way whether the relevant prepayments to the English and BVI Defendants were made using funds drawn down under the Relevant Loans and whether the particular drawdowns relied upon were at any stage repaid to the Bank. If it did perform that exercise, it did not put the results in evidence. Instead, it relied on the narrative attached to transfers to and from the suppliers. Similarly, although the Bank could easily have shown what happened to the relevant prepayments to the English and BVI Defendants, it either did not find out or did not put the results in evidence.

52. In some instances, it is not easy to trace where the relevant monies ended up because the English and BVI Defendants or their principals did not transfer them to a single recipient but broke them up and paid them to different persons, in whose hands the funds became mixed with other funds. In other cases, the circles of movement of relevant funds between the thirty-five suppliers and forty-six Ukrainian borrowers are broken, in that monies are paid to a different (and arguably solvent) borrower and used to repay its indebtedness, thereby in effect substituting one of the insolvent Ukrainian borrowers for an arguably solvent borrower. But according to the First Defendant's analysis these cases are included in the US$559 million out of the total funds drawn down that were not repaid by the Ukrainian borrowers. In all cases where such funds were paid to the English or BVI Defendants before being repaid in that way to the Bank, the Defendants accept that the Bank has a good arguable case that the monies advanced are loss suffered by the Bank. But of the US$559 million only about US$248 million is accepted by the Defendants to have passed through the English and BVI Defendants and been repaid in that way or otherwise dissipated.

53. The spreadsheets annexed to Mr Lafferty's evidence and his analysis enable the First Defendant to be precise about the amounts of money advanced under the Relevant Loans that were repaid to the Bank after drawdown. In the majority of cases the money was repaid to the Bank by the same borrower after having performed one or more loops via suppliers. This amounts to US$1,380,569,249 of the total amounts drawn down, of which $797,949,350 was used to repay the Relevant Loans themselves. In other cases, the monies drawn down were repaid by a different Ukrainian borrower. These amounted to another US$289,089,952 of which $213,006,751 was repayment of Relevant Loans. This is demonstrated, for the most part, by examining the bank statements of the borrowers and suppliers. Of the remaining drawdowns, US$266,699,633 was claimed by the Defendants to have been used to repay borrowings of one of the Ukrainian borrowers, but the funds had become split or mixed so that tracing the funds and identifying the relevant repayment is more difficult. I did not find the Defendants' evidence on this category of drawdowns as persuasive as their evidence

on other sums. It may well be that these monies were paid to the English and BVI Defendants as prepayments and were not then used to repay loans to Ukrainian borrowers. That arithmetic nevertheless explains how the Defendants arrived at a figure of about $559 million, which they accept was not used to repay debts of the Ukrainian borrowers.

54. So far as loss caused by the making of the Relevant Loans is concerned, this is a matter of Ukrainian law. The only evidence before me in that regard is from Mr Beketov in his 5th report at paras 13-15, where he says:

> "13. Even if part of the exact same monies that the Borrowers received from the Bank under the Relevant Loans was circulated back to the Bank for the purpose of discharging earlier loans (in whole or in part), the misappropriation of funds from the Bank via the Relevant Loans… would remain unremedied and the defendants' unlawful actions in relation to those agreements, as described at paragraphs 122-133 of my first report, would remain actionable under Article 1166 of the Civil Code.
>
> 14. Mr Lafferty asserts at paragraph 125 of Lafferty 3 that when quantifying the Bank's loss in these circumstances, credit must be given (i.e. the Bank's loss must be reduced) because an earlier loan was repaid "*which would otherwise not have been repaid*". No factual basis for this assumption of non-repayment appears to have been put forward by Mr Lafferty, but if the relevant borrower would not have made repayment to the Bank but for its receipt of funds unlawfully misappropriated from the Bank at a later date (via the Relevant Loans and associated agreements), I do not agree with his assertion that credit for the repayment of that loan must be given. In my opinion, where the victim of unlawful conduct that is actionable under Article 1166 of the Civil Code suffers loss in the form of a misappropriation of its property, that loss is not reduced if the tortfeasor returns the property to the victim in purported remedy of an earlier debt. I should also point out that there is no rule of Ukrainian law that would oblige the victim in such circumstances to sue the tortfeasor in relation to one misappropriation rather than the other.
>
> 15. Moreover, in general I consider that where monies purportedly used to repay an unlawful loan are themselves referable to other, unlawful lending, as a matter of Ukrainian law the repayment would not be considered to operate to reduce the Bank's loss. At paragraphs 135-136 of my first report, I explained why the reduction in outstanding liability on the Relevant Loans using monies referable to subsequent, unlawful loans, i.e. the New Loans entered into in 2016 (the proceeds of which were applied purportedly to repay the outstanding liability on the Relevant Loans), did not operate to reduce the Bank's loss. In my view the same applies in respect of any reduction of outstanding liability on the Relevant Loans using monies referable to prior, unlawful loans."

55. Therefore, as a matter of Ukrainian law, I must accept that the Bank has a good arguable case that even if it received the funds back, in discharge of other unlawful lending, it still suffered loss as a result of the "misappropriation" of the funds drawn down under the Relevant Loans. But that cannot apply in the case of the US$1,010,956,101 used to repay the Relevant Loans. So if the claim had been pleaded more generally in relation to US$2.495 billion of relevant funds drawn down, the maximum loss would be around $1.479 billion.

56. However, the question of whether prepayments were made to the English and BVI Defendants using funds from the Relevant Loans is a question of fact, not law. The Bank's claim is limited to funds under Relevant Loans being misappropriated by being paid to and not repaid by the English and BVI Defendants. Where funds previously advanced under Relevant Loans were repaid to the Bank before the relevant prepayments to the English and BVI Defendants were made, the relevant prepayments were not made with the same monies that had previously been drawn down and so cannot form part of the loss for which the Bank claims. So unless the Bank has a good arguable case that it was Relevant Loan monies that were paid to the English and BVI Defendants as the Unreturned Prepayments, its case cannot be proved as a matter of fact.

57. In my judgment, at this interim stage the Defendants have sufficiently shown that, of the total funds drawn down under the Relevant Loans, US$1,010,956,101 came back to the Bank and discharged Relevant Loans of Ukrainian borrowers. The Bank therefore does not have a strong prima facie case in excess of US$1,484,463,028 (being the balance of the total drawdown of $2,495,419,129). But the true claim will be lower than this because it has been plausibly shown by Mr Lafferty's analysis (as summarised on his consolidated spreadsheet at hearing bundle SB5/K/128) that large parts of the total of $1,484,463,028 did not reach the English and BVI Defendants. The sums in question are the sums in cells D95, F95, H95 and I95 of the Lafferty spreadsheet, but not the sum at cell G95, since this is part of the sum of $266,699,633 identified in para 53 above, where I accept that that sum may well have been paid to the English and BVI Defendants. In response to the Lafferty spreadsheet the Bank produced its own spreadsheet analysis, accompanying a Note on Loss dated 31 July 2018 (the last day of the hearing). Importantly, although that Note raised a number of challenges to the Lafferty analysis and the Lafferty spreadsheet, it did not challenge the figures that appeared in the cells of the Lafferty spreadsheet just mentioned or suggest that more of the sums in them should have appeared in the corresponding cells (D94, F94, H94 and I94) for amounts that the First Defendant accepts passed through the accounts of the English and BVI Defendants. Accordingly, the aggregate of the sums in cells D95, F95, H95 and I95, namely $969,497,733 falls to be deducted from the sum of $1,484,463,028 leaving a realistically arguable claim of **US$514,965,295**.

58. The claim against the English and BVI Defendants is brought on two grounds. First, that they procured and assisted in the misappropriation of the US$1.91 billion that passed briefly through their bank accounts. For the reasons given above, there is a good arguable case that at most about US$515m of Relevant Loans passed through their accounts in such a way as to be capable of causing loss to the Bank in connection with those loans. The rest of the monies received by the English and BVI Defendants appears on the evidence I have seen either not to be money drawn down under Relevant Loans or to have been used to repay Relevant Loans. Although the Bank presents a different analysis, it has not followed the money in the same compelling way that the First Defendant has done. In the light of all the evidence before me, the Bank does not establish a good arguable case for tortious loss as pleaded in excess of the sum stated above.

59. The second basis of the claim against the English and BVI Defendants is that each of them was unjustly enriched at the expense of the Bank. The evidence of Mr Beketov about the Ukrainian Law of unjust enrichment is in paragraph 77 – 80 of his first expert report. Having cited Article 1212 of the Civil Code, he states:

> "… unjust enrichment occurs where the following elements are present:
>
> a. one party (the "acquirer") is enriched by acquiring or preserving property;
>
> b. the enrichment occurs at the expense of another party ("the injured party"); and
>
> c. there are not sufficient legal grounds for the acquirer's enrichment, or those grounds have fallen away.
>
> Liability for unjust enrichment is distinguishable from liability in tort in that it requires either unlawful conduct or fault on the part of the acquirer. An acquirer's obligation to pay arises from the fact of his enrichment (i.e. liability is receipt based), whereas a tortfeasor's liability arises from the harm he has caused, irrespective of whether he has benefited from the injured party's loss. A party may become enriched by (a) the actual acquisition of another property or property rights, including money…; or (b) preserving or saving his own property at the expense or detriment of another."

60. The unjust enrichment claim therefore appears hopeless when it is considered that, contrary to the appearance given by the Particulars of Claim, the English and BVI Defendants were no more than conduits for the US$1.91 billion to pass through en route for immediate return to the borrower or transfer to other offshore corporate entities (and then in many cases immediate return to the borrower and the Bank). The English and BVI Defendants were not enriched by acquiring US$1.91 billion or any money or rights. Para 79 of Mr Beketov's first expert report emphasises that a Defendant sued for unjust enrichment has to have benefited from the Bank's loss. It is clear, when the evidence about the nature of the scheme and what happened to the Relevant Loan money is properly analysed, that the English and BVI Defendants did not do so.

61. Subject to the remaining issues to be addressed in this judgment, it would therefore be appropriate to reduce any freezing order to a maximum sum of US$514,965,295 plus appropriately calculated interest.

IV. Non-disclosure and misrepresentation on the without notice application

62. The Bank made its without notice application for a worldwide freezing order on the basis of the first affidavit of Mr Lewis and the draft Particulars of Claim, to which I have already referred. There was other affidavit evidence before Nugee J. but I do not need to refer to that. Mr Stephen Smith QC, who appeared before Nugee J. as he did before me, prepared a detailed skeleton argument for the without notice application. It asserted that the English and BVI Defendants were closely involved in the misappropriation of about US$1.9 billion (para 21) and that they had been enriched because they received the Bank's monies, via the borrowers, but had no sufficient legal grounds to retain the monies (para 24). The English and BVI Defendants were alleged

to be as responsible as the Ukrainian borrowers for the Bank's loss because they were all involved in a fraudulent scheme (para 25.3). The skeleton argument asserted that the English Defendants were not merely being sued to oust the jurisdiction of the Swiss courts but because they were central to the fraud; they might have important disclosure to give, and they might have valuable rights that could be pursued in a post-judgment context (para 39.1). Although the skeleton argument invited the judge to pre-read the affidavit of Mr Lewis, no reference was made to the i2 Charts. No reference was made to the fact that the substantial majority of pre-payments were immediately repaid to the Bank, or that the funds never left accounts within the Bank. Mr Lewis's evidence did not disclose these matters.

63. The transcript of the hearing before Nugee J. shows that the Judge was immediately alert to the risk of the English Defendants being used as anchor defendants, who would not otherwise have been sued. The centrality to the fraud of the English Defendants and their rights in relation to the prepaid monies therefore became an important focus of the hearing. The Bank sought to demonstrate that the English Defendants were 'central' by referring to the supply agreements and pledges, into which they had entered, and the clear link between these and the Relevant Loans. Centrality was asserted on the basis that the English Defendants received $1.8bn between May and September 2014 and that there is no record of the Unreturned Prepayments being repaid, within 90 days or at all.

64. At an early stage Mr Smith QC said that if the English Defendants did receive large amounts of money and paid it away for no consideration, one option would be to appoint receivers over them to try to claw back the money, and that the English companies should have some very valuable causes of action. For that reason, he argued that there was a very real purpose in suing the English Defendants "even though at the moment they may not be sitting on piles of cash or assets". Mr Smith QC referred to the schedules annexed to the draft Particulars of Claim, including schedule 3 which identified the prepayments that the Bank contended had not been returned. He also referred to the i2 Charts in the following way:

> "then in appendix I schedule 6, a large number of colourful charts showing how payments were made in respect of the various supply agreements – well, and including the borrowers... which again I think for present purposes we don't need to dwell on the detail. And then in Schedule 7…"

No other reference was made to i2 charts or to what they showed.

65. At one point in the argument, the Judge asked "your case is that the 1.9 billion actually left the Bank and ended up in the hands of the English and BVI [Defendants]?".

Mr Smith replied: "that's right, yes".

The Judge: "and you haven't had it back".

Mr Smith: "No".

The discussion then turned to whether or not repayment of original loans with new invalid loans made any difference. When the Judge returned later to the question of whether the English Defendants were being sued for the sole object of joining the First and Second Defendants, Mr Smith said:

"English [Defendants] are not being sued to oust jurisdiction of the courts, they are central to the fraud, may have important disclosure to give and they may have valuable rights that can be pursued in a post-judgment context. That's the point I made to your Lordship this morning, they may have valuable rights that can be pursued in a post-judgment context. It's even conceivable that they can be pursued in a pre-judgment context by an officer of the court but that would be a fairly extreme situation, I accept."

Mr Smith explained that even if one object of suing the English Defendants was to join the First and Second Defendants, "it's not the sole object because there are good reasons for suing the English Defendants, as explained".

66. Nugee J. was not told by the Bank that, as the Bank must have known, a very large proportion of the funds drawn down by borrowers under Relevant Loans were within a very short time, if not the same day, repaid to the Bank. Nor was he told that: prepayments made to the English and BVI Defendants were in many cases returned to the Ukrainian borrower and then repaid to the Bank on the same day; the English and BVI Defendants did not retain the prepayments in their accounts but immediately paid them to six offshore companies or repaid them to the same borrower; the funds never left the Bank but were simply moved from one bank account at PrivatBank in Cyprus to another, or that the i2 Charts showed a hugely complex web of transfers involving numerous other companies and, in some cases, showed repayment of funds to the Bank. Although footnote 82 in Mr Lewis's first affidavit did state that the monies received by the English Defendants had been moved on and could not be traced, neither this footnote nor the known facts were drawn to the Judge's attention. Instead, the impression was given to the Judge that if the English and BVI Defendants did not themselves retain control of the monies, they probably had a claim to recover them from others who held them, or for compensation. The Bank's complaint was, after all, that the English and BVI Defendants had been unjustly enriched at the Bank's expense.

67. The First Defendant in particular and all the Defendants in support criticise the Bank for its serious failure to disclose various facts to the court. They argued that the effect of the non-disclosure was to give the court a very slanted picture of a fraud in which three English companies were centrally involved and had valuable rights, such that a claim against the First and Second Defendants for the same quantum of compensation should naturally be heard at the same time as a valuable and substantial claim against the English Defendants.

68. The Defendants criticise the Bank for not disclosing the fact that of all the hundreds of companies involved in the scheme only three were English companies. Of the other numerous suppliers who received funds directly from one of the Ukrainian borrowers, most of these were registered offshore, and there was nothing distinctive about the English Defendants' involvement. A brief reference to and explanation of any of the i2 charts would have made this apparent. If the conclusions on which the Bank's claim was based were drawn from what the i2 Charts showed, it was wrong for the Bank to pass over these charts with the briefest of passing references. Study of the i2 Charts would have revealed that the analysis that the Bank had conducted started with the English Defendants and attempted to follow the funds received by them back to funds prepaid by Ukrainian borrowers who had Relevant Loans from the Bank. That would have involved explaining that funds were *assumed* to be retained by the suppliers for ninety days before being returned to a borrower to be prepaid once more, whereas the Bank knew or must have known (because an elementary study of the borrowers' and suppliers' bank statements with the Bank would have revealed it) that this was not the case.

69. The alleged centrality to the scheme of the English Defendants would have looked very different, the Defendants contend, had important facts relevant to appreciation of how the scheme apparently worked been disclosed. The appearance would have been given that the English Defendants were one of very many companies that were used as conduits for passing money round and round and returning it to the Bank, but without themselves having any rights to the money or control over it. The impression was wrongly given that the English Defendants were the "end of the line", when very basic disclosure of the relevant bank accounts would have shown the immediate return of the monies to the Ukrainian borrower's bank account, either directly or via an offshore principal, and this would have cast serious doubt on that part of the Bank's case. The Defendants contend that that in turn would have had a very substantial impact on the Judge's assessment of the real object and purpose of bringing the claim against the English Defendants at all. Given the basis of the Bank's claim, relying on specific drawdowns under identified Relevant Loans, the information that the Bank had that was not disclosed was highly material and would have damaged the attempt by the Bank to justify suing the First and Second Defendants under Article 6 of the Lugano Convention. It also makes a very substantial difference to the arguable quantum of the Bank's claim against any of the Defendants, and the appropriateness of the grant of a worldwide freezing order up to a sum of US$2.6 billion.

70. In his second and third witness statements, Mr Lewis does not challenge the factual analysis of the drawdowns and prepayments presented by Mr Lafferty in his second witness statement. The Bank's response to it is that much of the information thereby revealed is irrelevant to the basis on which it put its claim, which is not a proprietary or tracing claim. Its skeleton argument asserts that "this exercise takes the First Defendant nowhere". The Bank sticks with its analysis and does not suggest in its further evidence that the non-disclosure on which the Defendants rely was inadvertent or a mistake. Mr Lewis does however suggest that use of the English Defendants may have been deliberate in 2014, at a time when the regulators in Ukraine were cracking down on lending abuse.

71. It is however clear that the Bank must have had readily available at an earlier stage much of the factual information presented in Mr Lafferty's analysis. Further, although the Bank does not advance a proprietary claim to the monies advanced to the Ukrainian borrowers, it has carried out at least in part an exercise in tracing the monies advanced. This is clear from Mr Lewis' first affidavit, where he uses as an example transactions of AEF LLC, involving repayment of loans using funds lent to another company, Ribotto LLC, and transfers involving fifteen intermediary companies. His analysis and the relevant i2 Chart demonstrate that relevant lending was repaid to the Bank. However, the Bank's evidence and skeleton argument do not say that Relevant Loans were repaid to the Bank, just repaid by the supplier to the borrower after 90 days.

72. The duty of an applicant for a without notice injunction is to make full and fair disclosure of all the material facts. The material facts are those which it is material for the Judge to know in dealing with the application as made: <u>Brink's Mat Ltd v Elcombe</u> [1988] 1 WLR 1350 at 1356 G-H. An applicant must make proper enquiries before making the application. If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived: <u>ibid</u> at 1357C. Whether or not an undisclosed fact is of sufficient materiality to justify or require immediate discharge of the order depends on the importance of the fact to the issues that were decided by the Judge on the application. In that regard, whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive.

73. These principles are well-known and have been considered, restated and applied in a number of well-known authorities to which I was referred, including OJSC Ank Yugraneft v Sibir Energy plc [2008] EWHC 2614 (Ch): [2010] BCC 475, in which Christopher Clarke J. approved the following guidance:

> "(1) If the Court finds that there have been breaches of the duty of full and fair disclosure on the ex parte application, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial.
>
> (2) Notwithstanding the general rule, the court has jurisdiction to continue or re-grant the order.
>
> (3) That jurisdiction should be exercised *sparingly*, and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.
>
> (4) The Court should assess the degree and extent of the culpability with regard to non-disclosure. It is relevant that the breach was innocent, but there is no general rule that an innocent breach will not attract the sanction of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction.
>
> (5) The Court should assess the important and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court. In making this assessment, the fact that the Judge might have made the order anyway is of little if any importance.
>
> (6) The Court can weigh the merits of the plaintiff's claim but should not conduct a simple balancing exercise of which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle.
>
> (7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.
>
> (8) The jurisdiction is penal in nature and the courts should have regard to the proportionality between the punishment and the offence.
>
> (9) There are no hard and fast rules as to whether the discretion to continue or re-grant the order should be exercised, and the court should take into account all relevant circumstances."

74. In Banca Turco Romana S.A. (in liquidation) v Cortuk [2018] EWHC 662 (Comm), Popplewell J. gave the following further guidance:

> "The importance of the duty of disclosure has often been emphasised. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that basic principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. If the court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, *drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make*. It is a duty owed to the court which exists in order to ensure the integrity of the court's process. The sanction available to the court to preserve that integrity is not only to deprive the

> applicant of any advantage gained by the order but also to refuse to renew it. In that respect it is penal, and applies notwithstanding that even had full and fair disclosure been made the court would have made the order. The sanction operates not only to punish the applicant for the abuse of process, but also, as Christopher Clarke J. observed in [*Yugraneft*], to ensure that others are deterred from such conduct in the future. Such is the importance of the duty that in the event of any substantial breach the court inclines strongly towards setting aside the order and not renewing it, even where the breach is innocent. Where the breach is deliberate, the conscious abuse of the court's process will almost always make it appropriate to impose the sanction." (*emphasis added*)

75. On the other hand, in a case where the breach was described as substantial but not decisive and was innocent, and where the overall merits of the claimant's claim cried out for relief, the court was prepared to continue a freezing order: National Bank Trust v Yurov [2016] EWHC 1913 (Comm).

76. In my judgment, there were material facts on which the Defendants would have relied and of which the Bank was aware that should have been but were not explained to the Judge. These were, in particular: that a very substantial proportion of the sums drawn down under the Relevant Loans were repaid to the Bank by the very same borrower, or by another of the forty-six Ukrainian borrowers, prior to the relevant prepayments to the English and BVI Defendants, and that in a substantial number of cases monies prepaid to the English and BVI Defendants between May and September 2014 were themselves, either directly or indirectly, repaid to the borrower and to the Bank, often on the same day. The Bank must have been aware of this because it would inevitably have sought to identify where the money went. There is evidence that it did carry out an exercise of following the money in the case of AEF LLC. These facts would have been immediately apparent from a first study of the bank statements of the borrowers and the English and BVI Defendants (and their alleged principals), all of which held accounts with the Bank. If the Bank did not actually know those facts then it undoubtedly should have done because it should have carried out investigations before applying for the extensive relief that it did.

77. In my judgment, it is no answer for the Bank to say that it was not claiming proprietary or tracing relief. An investigation into what actually happened to advances under the Relevant Loans, and in particular the US$1.9bn advanced to the English and BVI Defendants, was an essential part of considering whether its claim was being advanced on a sound basis, and was something that the Bank had to disclose to the court as being relevant to the strength of its claim for such extensive, urgent relief. The Bank should also have disclosed the relatively limited involvement of the English Defendants in the fraudulent scheme as a whole, which had been conducted over a period of up to six years and involved over one hundred and ninety companies in all, and that the English companies were only involved for a limited period of time, in the summer of 2014.

78. If all that factual information had been explained, and the Judge's attention had been drawn to the detail of some of the i2 Charts to demonstrate the Byzantine complexity of the scheme, there would have been real questions in the Judge's mind as to whether the claim against the English Defendants in particular was being advanced on a sound footing, and whether the quantum of the claim as pleaded by the Bank was justifiable, even as a claim against the First and Second Defendants. Instead, the Judge was given a misleading impression that the English and BVI Defendants were central to the

fraudulent scheme; that unlike all previous suppliers the English and BVI Defendants had not repaid the prepayments after ninety days, and that the monies had therefore ended up with them or with other persons who were holding the monies on their behalf. The Judge was persuaded that even if the English and BVI Defendants no longer had the monies in question in their accounts they had good arguable claims against others to recover the funds, or claims for breach of duty equivalent to the value of the funds.

79. A more complete factual picture would have led the Judge to question whether the quantum of any arguable claim of the Bank (on the basis pleaded) was not considerably overstated, for all the reasons that have led me to conclude that there is no good arguable case (on the basis pleaded) in excess of about US$515 million. But even more significantly, disclosure of the limited participation of the English and BVI Defendants in the fraudulent scheme, the evident fact that these companies did not retain or have rights over any of the monies that passed fleetingly through their accounts, and the reality that a claim in unjust enrichment against them was hopeless, would have had a real and possibly determinative impact on the assessment of whether the claim against the First and Second Defendants fell within the scope of Article 6 of the Lugano Convention.

80. The judge was aware of the risk that the English Defendants were being used inappropriately as anchor defendants for the purpose of suing the First and Second Defendants. He was persuaded that there was a good and substantial claim against the English Defendants for US$1.8 billion just as strong as the claim against the First and Second Defendants for US$1.91 billion. It was properly disclosed to him that the English Defendants had only very limited assets, but nevertheless he was persuaded that the English Defendants might have substantial assets in the forms of claims in relation to the monies they had received but no longer retained. Had the Judge seen that the English Defendants were no more than corporate shells being used – in the same way as dozens of other insubstantial suppliers, borrowers and other corporate entities – as conduits for passing vast sums of money around in loops and circuits, with the monies being removed from the English Defendants' accounts with the Bank on the same day that they arrived and sent to another account held by another company with the Bank, the Judge would inevitably have seen the claims against the English Defendants in a very different light.

81. In my judgment, the Bank knew more about the full picture of the fraudulent scheme than they disclosed in their evidence on the without notice hearing, and they crafted their Particulars of Claim so as to make the English Defendants appear to be central to a scheme involving US$1.91bn being fraudulently acquired by the English and BVI Defendants, whereas they knew that the scheme was a US$5.5bn fraud in which the English and BVI Defendants were no more than incidental players among many others, being orchestrated by persons ultimately controlled by the First and Second Defendants. Presentation of those facts to the Court would inevitably have undermined the Bank's attempt to seise this Court of the claims against the First and Second Defendants.

82. Accordingly, in my judgment there were serious breaches of the duty of disclosure in this case. The Bank chose to present its case in a particular way, to suit its purpose of establishing jurisdiction against the First and Second Defendants. Having prepared and presented the case in that way, it either did not properly consider whether there was material that should be shown to the court that cast substantial doubt on whether the claim was properly presented in that way or it suppressed that material.

83. The Bank has not adduced any evidence to suggest that the failure to make appropriate disclosure was innocent, although Mr Smith QC argued that it was. The breaches were deliberate at least in the sense that the Bank deliberately presented its case in a particular way and did not draw attention to material that would cast real doubt on the validity of its claim. I do not accept that this was accidental. The failures to disclose and the misleading impression given of the centrality and importance of the English Defendants were in my judgment highly material to the outcome of the application.

84. Although the Bank has – as I have found – a good arguable claim against all Defendants in Ukrainian law of tort for up to US$515 million, I consider it at least very doubtful that the Bank would have obtained freezing relief in a greater sum than that on a without notice application, and there is real doubt whether Nugee J. would have been satisfied, on a without notice application, that the court had jurisdiction against the First and Second Defendants under Article 6. For these reasons, although there is a good arguable claim on the merits for a lesser sum, I would set aside the injunction that was granted without notice. Whether or not any injunctive relief should be re-imposed must be addressed in the light of the jurisdictional issue to which I must now turn.

V. Jurisdiction over the First and Second Defendants: Article 6.1 of the Lugano Convention

85. The First and Second Defendants may be sued in England and Wales, despite their Swiss domicile, if the claims against them and the claims against the English Defendants are so closely connected that it is expedient to hear and determine them together, to avoid the risk of irreconcilable judgments resulting from separate proceedings: Article 6.1 of the Lugano Convention. To the extent (as I have determined above) that there is a good arguable claim in Ukrainian law against the First and Second Defendants and the English Defendants, as joint and several tortfeasors, there is on the face of it such a close connection between the claims that is likely to render it expedient for the claims to be heard together, as part of a single enquiry into the facts of the allegedly fraudulent scheme and the knowledge and involvement of the Defendants. If the English Defendants were sued to judgment in England and Wales and the First and Second Defendants in Switzerland, the separate proceedings might give rise to different judgments that were irreconcilable, contrary to fundamental principles of the previous Brussels Regulation (now the "Recast Regulation" of 2012), which principles extend to the Lugano Convention.

86. However, the First and Second Defendants argue that the use of the English Defendants as anchor defendants is on the facts of this case an abuse of Article 6, in that the sole object of suing the English Defendants is to remove the First and Second Defendants from their jurisdiction of domicile. As a matter of EU jurisprudence, it is now clearly established that Article 6 cannot be used in such circumstances to confer jurisdiction on a non-domicile State; but the operation of this principle in the context of a case where there is admitted or found to be a good arguable claim against the domestic defendants is not wholly straightforward. Although in Sabbagh v Khoury [2017] EWCA Civ 1120, the Court of Appeal held by a majority that a claim against an anchor defendant that presents no serious issue to be tried should be treated as (or in the same way as) a claim the sole object of which is to remove co-defendants from their jurisdiction of domicile, the majority did not decide that the existence of a serious issue to be tried precludes a conclusion that the claim was brought with the sole object of conferring extra-territorial jurisdiction. The issue is likely to arise where, as here, there

is in principle a good arguable claim against an anchor defendant who has no or no substantial assets that in ordinary circumstances would justify bringing the claim against it.

87. Linguistically, it is not obvious that a "sole object" exception applies under Article 6.1, where the only criteria are the close connection and the expediency of a single trial to avoid a risk of irreconcilable judgments. Article 6.2, on the other hand, which is concerned with third party proceedings, expressly states an exception where the original proceedings "were instituted solely with the object of removing [the third party] from the jurisdiction of the court which would be competent in his case". Where there is no serious issue to be tried against the anchor defendant, the risk of irreconcilable judgments and so the basis for any finding of expediency may be seen to fall away, such that Article 6.1 is inapplicable on its own terms. A similar conclusion may be reached for other reasons, where it is evident that there will be no judgment in the claim against the anchor defendant in any jurisdiction. But the same does not apply where an arguable claim against an impecunious anchor defendant will be pursued together with the claim against the co-defendants.

88. The appropriate starting point of the EU jurisprudence is the decision of the CJEU in Reisch Montage A.G. v Kiesel Baumaschinen Handels GmbH [2007] I.L.Pr.10. The claim was brought in Austria against an Austrian debtor and a German surety. At the time of the proceedings, the debtor was insolvent, such that there was a procedural bar to the claim against him in Austria. The Advocate-General's opinion was that Article 6.1 of the Brussels Regulation could not be relied upon to give jurisdiction against the surety where the claim against the debtor had immediately to be dismissed. The court reached a different conclusion. It held that Article 6.1 could be relied upon even where the claim against the anchor defendant was inadmissible by reason of a domestic rule. The court added, at para 32:

> "however, the special rule on jurisdiction provided for in Art. 6.1 of Regulation 44/2001 cannot be interpreted in such a way as to allow a plaintiff to make a claim against a number of defendants for the sole purpose of removing one of them from the jurisdiction of the courts of the Member State in which that defendant is domiciled…"

and referred to previous case law supporting that proposition. The court also observed that national courts had to interpret the Regulation having regard to the principle of legal certainty, which:

> "…requires, in particular, that the special rules on jurisdiction be interpreted in such a way as to enable a normally well-informed Defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued".

89. The issue came before the CJEU again in Freeport plc v Arnoldsson [2008] QB 634. The court was asked, among other questions, whether it was a precondition for jurisdiction under Article 6.1 of the Regulation that the action against the anchor defendant was not brought solely in order to have a claim against another defendant heard where otherwise there would be no jurisdiction, and if not whether the prospects of success against the anchor defendant should be taken into account in determining whether there is a risk of irreconcilable judgments. The Advocate-General identified, at para 47 of his Opinion, that those questions were effectively asking whether a claimant positively had to establish that the claim against the anchor defendant was not

brought solely with the illegitimate object in mind. He proposed the answer that Article 6.1 should be interpreted as meaning:

> "...that it does not permit a claimant to bring claims against more than one defendant with the sole object of ousting the jurisdiction of the courts of the Member State in which one of the defendants is domiciled, even if those claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings".

90. The court adverted to the absence in Article 6.1 of words stating a criterion of "sole object" and concluded:

> "…the answer to the question referred must be that Article 6.1 of Regulation No.44/2001 applies where claims brought against different defendants are connected when the proceedings are instituted, that is to say, where it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings, without there being any further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the Member State where one of the defendants is domiciled".

It is not wholly clear, but that appears to be a decision that a claimant need only prove the close connection and expediency explicitly referred to in Article 6.1 and need not also disprove that the claim is brought with the forbidden sole object.

91. Such an interpretation – which does not exclude the ability of a defendant to seek to establish an illegitimate sole object – is consistent with the later decision of the CJEU in Cartel Damages Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV [2015] QB 906. The issue in that case was whether jurisdiction against foreign co-defendants was validly established where the claim against the anchor defendant was (possibly collusively) withdrawn. The court emphasized that Article 6.1 provides a special rule that derogates from the principle that jurisdiction is based on a Defendant's domicile, and therefore should be strictly interpreted. The court stated:

> "according to settled case law, Article 6.1 cannot be interpreted as allowing an applicant to make a claim against a number of defendants for the sole purpose of removing one of them from the jurisdiction of the courts of the Member State in which that Defendant is domiciled: the *Reisch Montage* case…..
>
> The court has nevertheless stated that, where claims brought against various Defendants are connected within the meaning of Article 61 of Regulation No.44/2001 when the proceedings are instituted, the rule of jurisdiction laid down in that provision is applicable without there being any further need to establish separately that the claims were not brought with the sole object of

> ousting the jurisdiction of the courts of the Member State where one of the defendants is domiciled: *Freeport PLC v Arnoldsson* [2008] QB 634, para 54.
>
> It follows that where, when proceedings are instituted, claims are connected within the meaning of article 6(1) of Regulation No.44/2001, the court seised of the case can find that the rule of jurisdiction laid down in that provision has potentially been circumvented only where there is firm evidence to support the conclusion that the Applicant artificially fulfilled, or prolonged the fulfillment of, that provision's applicability." (paras 27-29)

The conclusion is that reliance on Article 6.1 is illegitimate where it is either being used for the sole purpose of removing a defendant from his jurisdiction of domicile or it is clear that the claimant has artificially fulfilled (or prolonged the fulfillment of) the applicability of the rule. In both cases the onus lies on a defendant seeking to establish such matters.

92. These decisions of the CJEU were considered at length by the Court of Appeal in Sabbagh v Khoury. The particular issue in that case was whether or not the absence of a seriously arguable claim against the anchor defendant could itself be a bar to reliance on Article 6(1) of the Brussels Regulation. The court concluded that EU jurisprudence did not preclude consideration of the substantive merits of the claim against an anchor defendant. It concluded, by a majority, that it could not be expedient to determine a claim against an anchor defendant that was not seriously arguable together with a claim against a foreign co-defendant over whom there would otherwise be no jurisdiction. It considered that "the purpose of the "sole object" exception is to ensure that Article 6(1) is not wrongfully invoked" (para 67), and that:

> "in bringing an unsustainable claim against an anchor defendant, it can be inferred that the purpose of making the claim is to remove the co-defendant(s) domiciled in other Member States from the jurisdiction of the courts of those States".

93. In short, any artificial fulfilment (or apparent fulfilment) of the express requirements of Article 6.1 is impermissible, and this includes a case where the sole object of the claim against the anchor defendant is to remove the foreign defendant from the jurisdiction of domicile. Bringing a hopeless claim is one example of such abuse, but the abuse may be otherwise established by clear evidence. In principle, the fact that there is a good arguable case against the anchor defendant should not prevent a co-defendant from establishing abuse on some other ground, including that the "sole object" of the claim is to provide jurisdiction against a foreign domiciled co-defendant.

94. The facts relevant to an assessment of the purpose of the Bank's claim against the English Defendants seem to me to be the following:

(1) There is a good arguable claim against them in tort for loss of about US$515m.

(2) The claim against the English Defendants based on unjust enrichment is hopeless.

(3) The English Defendants have no substantial assets, as the Bank was aware.

(4) The English Defendants have no particular significance as corporate entities involved in the fraudulent scheme, other than the fact that they are English companies.

(5) The English companies appear to have been set up to act as agents for offshore companies and are run by Cypriot corporate service providers with accounts in Cyprus, which facts were at all times available to the Bank.

(6) The Particulars of Claim present a misleading picture of the English Defendants being central to the fraudulent scheme and as being the intended recipients of US$1.8bn.

(7) The First and Second Defendants are known to be extremely wealthy businessmen with substantial assets worldwide under their direct or indirect control.

(8) The claim against the First and Second Defendants is valued at US$5.5bn according to the Bank, but the Bank has chosen to bring instead a claim for US$1.91bn of money that passed through the English and BVI Defendants' bank accounts.

(9) As compared with a trial in Ukraine or Switzerland, proceedings in England and Wales confer substantial procedural advantages on the Bank, including (a) the ability to obtain worldwide freezing orders extending to assets only indirectly controlled by the First and Second Defendants, (b) an extensive disclosure regime and (c) cross-examination of witnesses at trial.

95. These facts themselves give rise to a strong inference that the English Defendants are only being sued in order to be able to bring a claim in London against the First and Second Defendants. What other reason could there be for bringing a claim against limited companies that, on any fair analysis of the evidence that the Bank had about the scheme, were mere conduits that have no independent business or purpose or any realisable assets?

96. The Bank's answer to that question is that the English Defendants are "legitimate targets in their own right". A number of justifications for this are advanced:

i) The directors of the English Defendants are likely to be liable for their breaches of duty in dissipating the companies' assets for no return. However, this argument proceeds on a false basis: the English Defendants only received the prepayments very briefly, under a pre-arranged scheme in which they were immediately to pass the funds on or back to the borrowers. The money never became the English Defendants' money. In any event, the directors are offshore corporate directors.

ii) The shadow directors of the English Defendants breached their duties to the companies. But this justification is subject to the same objections as under i) above.

iii) The English Defendants will have rights under the agency agreements, assuming that they are valid. The English Defendants have disclosed agency

agreements with other offshore companies. Under those agreements, the English Defendants are entitled to be indemnified against any losses they incur, which could extend to liability of the English Defendants in damages to the Bank. This may be right in principle, but if the agency agreements are valid the Bank will be able to sue the principals directly (and the First and Second Defendants directly) and there is no identified benefit in obtaining a judgment against the agents first. There is no evidence or suggestion by the Bank that the principals have any assets to which the Bank might ultimately be able to have recourse. In any event, the Bank's case is that all the agency agreements are shams, set up for the purpose of giving apparently credible justification for the huge sums of money that were lent to the Ukrainian borrowers and advanced to the suppliers. Moreover, the Bank's position is that it was unaware of these agency agreements until Mr McNeill's evidence was served in March of this year. The Bank even denies having access to its own loan sheets, which contain a bare record of the English and BVI Defendants' agency status, even though the directors of the English and BVI Defendants were recently able to obtain these from the Bank's branch in Cyprus. Accordingly, the possibility of an indemnity claim against the English Defendants' principals cannot have been a reason why the claim was issued against the English Defendants.

iv) The English Defendants will have important disclosure to give. The Bank points in particular to documents likely to show the circumstances of drafting the supply agreements and the loan file supply agreements and negotiations with the borrowers; the negotiation of the agency agreements; documents that – according to the terms of the agency agreements – would have to be produced in accordance with them relating to the actions of the English Defendants, and documents relating to the beneficial ownership and administration of the English Defendants. If the English Defendants were substantial entities and central to the fraud, as the Bank contended, then there might well be a reasonable expectation that some or all of the identified documents exist. However, the reality is that the English Defendants are mere creatures and conduits, and it is highly implausible that the English Defendants negotiated any of the documents in question or that the agency agreements have been operated in accordance with their terms. The Bank's skeleton argument asserts that "none of the [English and BVI Defendants] had any website, offices, staff, warehouses, workforce or any other public presence". If the Bank were entitled to sue the First and Second Defendants, it is understandable that it might also choose to sue the English and BVI Defendants in the hope that something additional, or inconsistent with the First and Second Defendants' cases, might emerge on disclosure. But that is not the question: the question is whether there was any real purpose in suing the English Defendants other than to join the First and Second Defendants to the claim.

97. All of the above arguments are advanced by the Bank after the event to seek to establish that the sole object of suing the English Defendants was not to sue the First and Second Defendants. It is notable that, in its evidence in response to the Defendants' jurisdiction applications, the Bank says nothing about why it actually sued the English and BVI Defendants in December 2017. Its skeleton argument at the without notice hearing did assert that the English and BVI Defendants might have valuable rights and important disclosure to give, but little detail was provided at that time. The arguments give the appearance of having been developed retrospectively in an attempt to justify the claim that was brought. Some of the retrospective justifications could not have been the

Bank's reasons at the time: e.g. the possibility of an indemnity claim, of which the Bank was then unaware.

98. After considering carefully what the Bank has submitted and the likelihood of the Bank suing the English Defendants if it could not have sued the First and Second Defendants, I have no doubt that the Bank has sued the English Defendants in order to establish jurisdiction to sue the First and Second Defendants in London under Article 6 of the Lugano Convention. I conclude that it is also the sole reason that this particular claim has been brought against the English Defendants. My reasons, in brief summary, are the following.

99. First, no direct evidence has been given as to why in fact the Bank brought a claim against the English Defendants in December 2017, and none of the arguments that the Bank puts forward now as justification are at all persuasive. The judgment in the Cartel Damages Claim makes clear that the relevant time is, unsurprisingly, the time at which the action was brought, not any later time. Some of the justifications on which the Bank relies could not have existed as reasons in December 2017 because the Bank was unaware of them.

100. Second, the claim that was brought has been artificially constructed in order to seek to enable the Bank to satisfy Article 6. The claim has been limited to US$1.91bn so that the claims against the First and Second Defendants and the English Defendants appear to be broadly co-extensive and their importance as defendants equivalent. The role of the English Defendants in the fraudulent scheme has been presented to make it appear that the English Defendants were central players in the fraudulent scheme and/or the recipients of the US$1.8bn, such that the Bank would naturally wish to pursue them. A restitutionary claim against the English Defendants, used to support this conclusion, is unsustainable.

101. Third, the Bank has presented its claim – in the particulars of claim and in its evidence upon the without notice application – so as to omit highly relevant facts. A true presentation of the facts would have revealed that the role of the English Defendants was no more than incidental to the working of the fraudulent scheme.

102. Fourth, there is no real attraction or benefit to the Bank in suing the English Defendants; the real defendants to the claim are the First and Second Defendants.

103. Fifth, the Bank has admitted that bringing a claim against the First and Second Defendants in London gives it significant procedural advantages, many of which the Bank has already enjoyed as a result of the worldwide freezing order and the Defendants' compliance with associated disclosure obligations. That was a real benefit to the Bank, as compared with the lesser attraction of litigating in Switzerland or Ukraine, and is self-evidently the reason for the proceedings in London.

104. I do not shut my eyes to the fact that the Defendants admit that the Bank has a good arguable claim against them for at least hundreds of millions of dollars. On the basis of the evidence that I have read, the proceedings would be very complicated and expensive. That is another reason why, in my judgment, the Bank would not have brought proceedings against the English Defendants on their own. It is, of course, unattractive for the First and Second Defendants to admit a good arguable case of fraud on an epic scale against them and yet seek to prevent this court from investigating the matter. That is particularly so where the First Defendant is on record as previously having stated to the press in Ukraine that the English court can be expected to get to the truth of the matter. However, the consequence of my conclusion is not that the First

and Second Defendants will escape justice but that they are entitled under the terms of the Lugano Convention to have any claim brought against them in Switzerland, where they are domiciled. Alternatively, the Bank could bring its proceedings against them in its own State, Ukraine, which is not a party to the Lugano Convention. That is where the entire factual subject matter of the claim naturally resides and where the First Defendant has himself issued proceedings relating to the subject-matter of the alleged fraud. What the Bank is not permitted to do is forum shop without regard to international conventions on jurisdiction.

105. Accordingly, my decision is that the court has no jurisdiction against the First and Second Defendants and for that reason too the orders – including the worldwide freezing order – that have been made against them must be set aside.

VI. Lis alibi pendens: stay in favour of related proceedings in Ukraine

The applications for a stay

106. The First and Second Defendants and the English Defendants apply to stay the current claims against them as a matter of discretion on grounds of *lis pendens* in Ukraine. In the case of the First and Second Defendants, the issue does not strictly arise in view of my conclusion on the jurisdiction of the English court. In case I am later held to have been wrong in that decision, I will express my conclusion on the First and Second Defendants' alternative argument for a stay.

107. In their case, where the English court only has jurisdiction (if at all) pursuant to the Lugano Convention, the application is based on a "reflexive" application of Lugano Article 28, under which a Convention State may stay proceedings in favour of existing, related proceedings in another Convention State. Ukraine is not a Convention State, hence the suggested "reflexive" application of Article 28 by this Court under its inherent jurisdiction that the First and Second Defendants seek.

108. In the case of the English Defendants, the application for a stay of proceedings against them – where there is no issue about the jurisdiction of this Court – has to be determined not just under the Recast Regulation on the basis of any related proceedings in Ukraine but in the light of my decision that there is no jurisdiction to try the First and Second Defendants and my reasons for that decision. I have found that the sole object of bringing the claim against the English Defendants was to establish jurisdiction against the First and Second Defendants and that the Bank would not otherwise have brought the claim. That does not of itself make pursuit of the claim against the English Defendants an abuse of process but it is obviously material on the question of whether a stay is appropriate. There will be no trial of the claim against the First and Second Defendants in this court unless the Bank first succeeds on appeal in establishing jurisdiction and then no stay of the 'reinstated' proceedings against the First and Second Defendants is granted. If the Bank does not appeal or loses its appeal and sues the First and Second Defendants in Switzerland or in Ukraine, another State will be seised of the principal proceedings relating to the subject-matter of the Bank's claim.

109. The English Defendants cannot invite the Court to decline jurisdiction on grounds of *forum non conveniens* (Owusu v Jackson [2005] QB 801). They apply for a stay pursuant to Article 34 of the Recast Regulation, on the basis that related proceedings exist in Ukraine. They did not address specifically the approach that the court should take to the claim against them in the event that the court held that it had no jurisdiction to try the First and Second Defendants. The BVI Defendants did submit, in the context of their argument that leave to serve out of the jurisdiction should not be granted, that

it could not be reasonable to try a claim against the English Defendants where the claim against the First and Second Defendants was not proceeding and where a stay of the claim against the English Defendants was justified under Recast Article 34.

110. In the light of my findings about the purpose of the proceedings against the English Defendants, it would manifestly be just and convenient to stay that claim for the time being, if it were possible to do so. I would have been inclined to do so to that extent as a matter of the exercise of the Court's inherent jurisdiction or alternatively pursuant to rule 3.1(2)(f) of the Civil Procedure Rules. The ability of the court to do so in such circumstances is emphasised by Andrew Smith J in Ferrexpo AG v Gilson Investments Ltd [2012] 2 Lloyd's Rep 588 at [199]. It would be illogical to find that the real claim of the Bank lies against the First and Second Defendants and that the claim against the English Defendants was brought for the sole purpose of conferring jurisdiction for that claim and then to leave the proceedings against the English Defendants pending. That is particularly so where (unless an appeal against my judgment succeeds) a claim will very likely be issued against the First and Second Defendants in another jurisdiction. It might be said by the Bank that in view of my findings a stay is unnecessary, since the claim against the English Defendants will not proceed in the absence of a claim against the First and Second Defendants; but I consider that it would be wrong to allow (and therefore in effect require) the existing claim to continue in such circumstances, where it might then be used by the First and Second Defendants to contest jurisdiction in another State.

111. However, it has been drawn to my attention that the English Defendants did not in terms apply for a stay under the Court's inherent jurisdiction or the CPR, but only under article 34 of the Recast Regulation. Although their application might have been worded sufficiently widely to permit such an argument to be advanced, they did not in fact do so, either in writing or orally. I should therefore not grant a stay on that basis. I will consider instead later in this judgment whether a stay pursuant to article 34 is justified.

112. If I had reached a different conclusion on the jurisdiction of the Court to try the claim against the First and Second Defendants, i.e. that there was no abuse of Lugano Article 6 even though the main object of the claim against the English Defendants was to create jurisdiction to try the First and Second Defendants, the matter of a stay would have arisen in their case too. I will therefore deal with the arguments addressed to me on the applications of the First, Second and English Defendants for a stay on grounds of *lis pendens* in case it is later held that I should have reached a different conclusion on jurisdiction.

113. In that context, it is appropriate to consider the First and Second Defendants' applications for a stay first. If no such stay were granted and the claim against them were to proceed, it is most improbable that I could conclude, for the purposes of Recast Article 34 in the case of the English Defendants, that a stay of the claim against them was necessary for the proper administration of justice.

Reflexive Application of the Lugano Convention

114. If this court has jurisdiction over the First and Second Defendants, it has it only pursuant to the Lugano Convention. Accordingly, any stay of the proceedings against the First and Second Defendants could only be granted pursuant to the terms of that Convention or under the inherent jurisdiction of this Court. The Lugano Convention does not contain Articles providing for a stay of proceedings in a Convention State in favour of

a 'third State'. The position was the same in relation to the Brussels Regulation of 2001, but is now different under the Recast Regulation.

115. The First and Second Defendants contend that this Court can nevertheless apply by analogy the provisions of Article 28 of the Lugano Convention in relation to *lis pendens* in a third State. Article 28 states:

> "1. Where related actions are pending in the courts of different States bound by this Convention, any court other than the court first seised may stay its proceedings.
>
> 2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.
>
> 3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

116. The Court would therefore not in reality be applying Article 28 of the Convention because it only provides for a discretionary stay of proceedings in favour of proceedings in another Convention State. Ukraine is not a Convention State. Instead, the Court would be exercising its inherent power to control its business and do justice by analogy with the provisions of the Convention, even though it does not strictly apply. In so doing, the court would be seeking to give effect to the policy considerations underlying those provisions, so far as they apply in the case of a non–Convention State.

117. The question of whether such provisions of the Lugano Convention or (prior to 2012) the Brussels Regulation should be applied "reflexively" by the domestic courts of the United Kingdom has been the subject of lively debate among academic writers and has given rise to apparently different judicial decisions. There is no decision that strictly binds me, though the preponderance of decisions is in favour of "reflexive" application and some *obiter dicta* in the Court of Appeal can be read as giving support to such application.

118. Whether any of the Member States has or should exercise a power to stay proceedings in favour of proceedings in a third State is, necessarily, a matter of domestic law. The Brussels Regulation (before 2012) and the Lugano Convention are silent on the matter.

119. The modern starting point for the debate is <u>Owusu v Jackson</u>. The CJEU decided that there could be no *forum non conveniens* argument where jurisdiction was conferred on a Member State by Article 2 of the Brussels Regulation (state of defendant's domicile). That was a case where the relevant third State was not seised of related proceedings. The court recognised that *forum non conveniens* was treated differently from the way in which the Brussels Regulation dealt with *lis alibi pendens*.

120. In <u>Catalyst Investments Group Ltd -v- Lewinsohn</u> [2010] Ch 218, Barling J. had to decide whether the Court should exercise its power to stay proceedings where there were identical pending proceedings in a non-EU State (Utah). It was argued that Article

27 of the Brussels Regulation (mandatory stay in favour of Member State first seised of the cause of action) should be applied reflexively, even though Utah was a non-EU State, and that the court should stay the proceedings on the basis that Utah was the most appropriate forum for the dispute, even though the domicile of all the defendants was England. Barling J. held that where the Court was seised by reason of domicile it had no power to decline jurisdiction in favour of a non–Member State on grounds of *lis pendens* or *forum non conveniens*.

121. It is, perhaps, unsurprising that Barling J. reached that conclusion, given that the defendants were arguing principally that the appropriate reflexive application of Article 27 of the Regulation was to apply English *forum non conveniens* rules, which principle the CJEU had expressly ruled against in the Owusu case. Barling J. referred to the basis of the decision in Owusu, namely that legal certainty would be undermined if there were such a discretionary power to stay, and considered that uniform application of the rules of jurisdiction outweighed any negative consequences of domicile–based jurisdiction. His reasoning was later overtaken by the terms of the Recast Regulation, which provided such a power where related proceedings existed.

122. In JKN -v- JCN [2010] EWHC 843 (Fam), Ms Lucy Theis QC held that the Owusu principle was not properly to be extended to cases where there were parallel proceedings pending in a non-Member State (in that case, New York). That was so because, among other reasons, the principle's rationale was not consistent with the court retaining a discretionary power to stay in favour of existing proceedings in another Member State. She noted that the decision of Barling J. had been met with some academic criticism and that doubt about it was expressed obliquely by Jacob LJ in Lucas Film Ltd -v- Ainsworth [2009] EWHC Civ 1328 at [134], though he did not need to decide whether it was right or wrong.

123. The most detailed consideration of the "reflexive" application principle in the context of the Brussels Regulation 2001 is the decision of Andrew Smith J. in Ferrexpo AG v Gilson Investments Ltd [2012] EWHC 721 (Comm); [2012] 2 Lloyd's Rep 588. The Judge first decided that the Owusu decision did not prevent a court from enforcing an exclusive jurisdiction clause, notwithstanding the domicile of the Defendant, or of giving effect to the terms of Article 22 of the Regulation (providing for courts of one state to have sole jurisdiction in certain types of case). He held that Article 22 should be applied reflexively in that case, in favour of jurisdiction in Ukraine, a non-Member State. A decision that the Regulation could in principle be applied reflexively by the English Court in favour of the courts of a non-Member State was therefore, on any view, part of the *ratio decidendi* of that decision. There is scope for debate as to whether the analysis of how Article 27 and 28 might be applied reflexively is *ratio* or *obiter*, but the judgment as a whole is carefully and closely reasoned, and its different parts are complementary and consistent, and I consider that I should afford the Judge's conclusions in relation to the application of those articles considerable respect.

124. Andrew Smith J. concluded that the English Court had a power to stay proceedings, by analogy with Article 28 of the Regulation, in favour of the courts of a non-Member State that was already seised of related proceedings (even though in that case the proceedings in question did not have same parties). The judge did not have to consider what principles should apply in the case of a non-Member State in the light of Article 34 of the Recast Regulation, which had not yet been promulgated. It seems to me that, since a reflexive application of Lugano Article 28 would only apply its principles by analogy, the Court should now additionally have regard to the particular considerations and conditions identified in Recast Article 34 when considering whether or not to exercise a discretion in favour of proceedings in a third State. That is because Article

28 assumes the existence of mutual enforcement and recognition machinery of the Convention as between the Convention States, which does not exist in the case of a third State. To put it in a different way, it would be a wrong exercise of discretion to stay proceedings in favour of related proceedings in a non-Convention State if a judgment of the courts of that State would not be capable of recognition and, if applicable, enforcement in the Convention State.

125. Although, as Andrew Baker J. has recently pointed out in BB Energy (Gulf) DMCC -v- Al Amoudi [2018] EWHC 2595 (Comm), the approach of Andrew Smith J. is no longer applicable in relation to cases under the Recast Regulation, by virtue of Articles 33 and 34 thereof, the reflexive application principle can still apply in relation to cases where jurisdiction is only conferred by the Lugano Convention, which contains no equivalent provisions relating to non-Convention States. I would respectfully follow the approach of Andrew Smith J, which benefits from academic approval and is consistent with the policy objectives recited in the Convention and the Regulation. In my judgment, this Court should apply by analogy the principles enshrined in Article 28 of the Lugano Convention, but bearing in mind in exercising its discretion the considerations (highlighted by the terms of Recast Article 34) that result from the fact that the related proceedings are in a non-Convention State.

Article 34 of the Recast Regulation

126. Article 34 of the Recast Regulation is contained in Section 9, which is headed "lis pendens – related actions". Article 34 is in the following terms:

> "1. Where jurisdiction is based on Article 4 [domicile] or Article 7, 8 or 9 and an action is pending before a court of a third State at the time when a court in a Member State is seised of an action which is related to the action in the court of the third State, the court of the Member State may stay the proceedings if
>
> a) It is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings;
>
> b) It is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and
>
> c) The court of the Member State is satisfied that a stay is necessary for the proper administration of justice.
>
> 2. The court of the Member State may continue the proceedings at any time if
>
> a) It appears to the court of the Member State that there is no longer a risk of irreconcilable judgment;
>
> b) The proceedings in the court of the third State are themselves stayed or discontinued;

> c) It appears to the court in the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or
>
> d) The continuation of the proceedings is required for the proper administration of justice.
>
> 3. The court of the Member State may dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.
>
> 4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible, under national law of its own motion."

127. Elsewhere in Section 9 of the Recast Regulation, the concept of related actions is partially defined. Article 30.3 states that, for the purposes of that Article:

> "…actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments relating from separate proceedings."

The word "related" in Article 34 (where it is not defined to any extent) is therefore capable of having a broader meaning, though the exercise of the court's discretion is circumscribed by three preconditions, the first of which is substantially the same criterion (minus the words "so closely connected") as is used in Article 30.3. Under Article 34, it is still avoidance of the risk of irreconcilable judgments that is the basis on which the discretion is likely to be exercised. Recital (21) of the Recast Regulation states:

> "In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of *lis pendens* and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation, that time should be defined autonomously."

That definition is provided by Article 32, which applies for the purposes of Section 9 generally, and to which I shall return.

128. Recitals (23) and (24) of the Recast Regulation are of particular relevance to Article 34. They provide:

> "(23) This Regulation should provide for a flexible mechanism allowing the courts of the Member States to take into account proceedings pending before the courts of third States, considering in particular whether a judgment of a third State will be capable of recognition

> and enforcement in the Member State concerned under the law of the Member State and the proper administration of justice.
>
> (24) When taking into account the proper administration of justice, the court of the Member State concerned should assess all the circumstances of the case before it. Such circumstances may include connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time."

The related proceedings on which the Defendants rely

129. All the Defendants rely on various proceedings that they claim were pending in Ukraine at the time when the English court became seised of the current proceedings. Most of the argument at the hearing was about the defamation claim brought by the First Defendant, but there are in fact many different sets of proceedings in Ukraine. These include:

a) Claims by borrowers against the Bank (or in two remaining cases by the Bank against borrowers) concerning the enforcement or validity of "new loans", which were allegedly used to repay Relevant Loans. Neither the English Defendants nor the First and Second Defendants are parties to these claims. These proceedings are said to give rise to issues about the lawfulness of the new loans, and whether or not they were validly used to repay Relevant Loans. There is said to be a risk that the Bank might take a different stance on the question (which is relevant to the quantum of its claim) in different proceedings.

b) Claims by Ukrainian borrowers or new borrowers against the Bank in which it is sought to establish that the Relevant Loans have been repaid. Neither the English Defendants nor the First and Second Defendants are parties to these claims either. Whether or not Relevant Loans were repaid is said to be directly material to the question of whether loss was caused to the Bank by sham Relevant Loans.

c) Other claims brought by borrowers or others relating to the "new loans" in which questions are raised about whether or not the Ukrainian borrowers and the Bank are connected parties. The Defendants are not parties to any of these claims. It is said that the question of whether the Ukrainian borrowers were creatures of or otherwise connected with the Bank is material to the claim brought by the Bank.

d) Defamation proceedings. These include principally a claim issued by the First Defendant on 1 November 2017 against a journalist,

Mr Miroshnik, a journal called "Law and Business", which controls the website on which the articles in question were published, the National Bank of Ukraine and the Bank, but there are also secondary proceedings issued by the English Defendants against the same defendants.

130. At the hearing, the Defendants focussed almost entirely on the defamation proceedings as being related proceedings for the purposes of the Lugano Convention and the Recast Regulation. To the extent that the other proceedings were relied upon, the relevant issue was said to be whether or not the new loans were valid and were used to repay borrowings under the Relevant Loans. There is some evidence to suggest that the Bank may be treating the new loans and the Relevant Loans as valid in Ukraine, whereas in the English proceedings they are said to be shams and fraudulent devices. If and to the extent that the new loans extinguished debts under the Relevant Loans, that would arguably reduce any quantum of the Bank's claim for losses caused by the scheme. However, it appears to be common ground between the experts on Ukrainian law that any findings in such proceedings could not give rise to any issue estoppel in the Bank's claim in England. Certainly, Mr Beketov's evidence is that there could be no such estoppel arising. There are alleged to be hundreds of such proceedings in Ukraine and they are not being consolidated and tried in one action, or even in groups of claims.

131. The defamation proceedings relate to the content of a two-part article published by Law & Business, which includes a report of a news conference given by a senior spokesman for the Bank, a Mr Shlapak. The English and BVI Defendants are all named as third parties in the principal proceedings, the effect of which under Ukrainian law is that they will all be bound by the findings of the court. The Pecherskyi district court in Kyiv made a formal order opening the principal proceedings on 4 December 2017. A subsequent attempt by the Bank to set aside the proceedings as against it failed. At the time of the hearing in July, these proceedings were still pending at first instance, though it was unclear what if any progress was being made in determining them. As I will explain later, in October 2018 both the principal proceedings and the third party proceedings were dismissed, of the court's own motion, apparently for procedural misconduct and not on the merits of the claims. However, the First Defendant and the English Defendants intend to appeal against the dismissal.

132. On 7 December 2017, after the principal proceedings had been formally opened, the English Defendants each filed papers in the Pecherskyi district court seeking to make their own claims within the existing defamation proceedings. Those claims were initially set aside, but then reinstated on appeal, and the status of them thereafter remained uncertain until they too were very recently dismissed.

133. It is unnecessary for present purposes to seek to resolve the question of when the Pecherskyi district court became seised of the English Defendants' claims for the purposes of Section 9 of the Lugano Convention or Section 9 of the Recast Regulation because, on any view, and as is now accepted by the Bank, the Ukrainian court was seised of the First Defendant's claim (in which the English Defendants were third parties) before the English court became seised of the Bank's proceedings. Lugano Article 30 and Recast Article 32 both state that a court is deemed to be seised at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff did not subsequently fail to take the steps he was required to take to have service effected on the defendant. It may therefore be that the Pecherskyi district court was seised of the First Defendant's claim on 1 November 2017, but it was certainly seised by 4 December 2017 when the proceedings were formally and validly opened.

134. The statement of claim in the First Defendant's defamation claim refers to the content of the two articles. These allege participation by the First Defendant in a fraudulent scheme, siphoning off funds in the sum of UAH19.9bn, with forty-three Ukrainian companies and six foreign companies participating; the provision of loans to shell companies and that the shareholders and management of the Bank were participants in a financial pyramid used to siphon off funds abroad. The First Defendant contends that the facts stated in the articles do not correspond with the reality and are invented. The statement of claim rehearses detailed factual allegations, which are in substance the facts alleged by the Bank in these proceedings, but which the First Defendant denies:

> "It is denied that there existed any dodgy unlawful scheme which was used to "siphon off" the monies from PJSC CB Privatbank and, therefore, to inflict harm to it".

The prayer at the end of the statement of claim requests declarations that around fifteen extracts from the articles are false and as such compromise the honour, dignity and business reputation of the First Defendant. No damages are claimed.

135. The First Defendant contends (and the Bank does not really challenge) that there is substantial overlap between the factual allegations in the First Defendant's Ukrainian proceedings and the Bank's proceedings in London, including: whether loans were made to parties related to the First and Second Defendants without adequate security; whether the loans were made in violation of banking legislation; whether the Ukrainian borrowers were shell companies with no commercial operations or ability to repay; whether the supply contracts made with (among many others) the English and BVI Defendants were shams and no genuine security was provided; whether the banking violations were committed with the direct participation of the First and Second Defendants, and other related allegations. The Bank does assert that the only allegation of defamation made against the Bank relates to a short statement attributed to a Mr Shlapak at the press conference referred to in the articles. This is true but legally irrelevant. The Bank is a party to the entire defamation claim and so it (and the English and BVI Defendants) will be bound by any factual findings made. Further, the Bank's attempt to have the proceedings against it dismissed on that basis failed.

136. At the time of the hearing before me in late July 2018, no further step had been taken towards a resolution of the First Defendant's claim. It is now evident that at that time a number of interlocutory skirmishes were taking place, mainly applications by the Defendants for the assigned judge to recuse herself. In early October, first the English Defendants' claim and then the First Defendant's claim were dismissed, apparently because of procedural impropriety that the court considered justified dismissal without a hearing on the merits. The Bank adduced further evidence relating to this and the Defendants put in evidence in response. All the parties made further brief written submissions. There was, unsurprisingly, no agreement on the exact basis on which the claims were dismissed – though it is evident that this was on a procedural basis, not after a hearing on the merits of the claims – or the effect in Ukrainian law of such a dismissal, save that it is common ground that the First Defendant and the English Defendants may appeal. They have indicated in evidence that they either have appealed or intend to appeal.

137. Given the right to appeal and the possibility (to put it no higher) that the proceedings may be reinstated after a successful appeal, it seems to me to be a proper conclusion that these proceedings are still 'pending' for Lugano-Brussels purposes, even though they currently stand terminated subject to appeal: see, by analogy, Moore v Moore [2007] EWCA Civ 361, per Lawrence Collins LJ at [103]. The issue is one of seisin,

not status: the Ukrainian courts remain seised of the claims, and the first instance proceedings and the appeal can properly be regarded as a "procedural unit": see C-296/10 Purrucker [2011] Fam 312 at [80]. The position is broadly the same in English procedural law: Starlight Shipping Co v Allianz Marine and Aviation Versicherungs AG; The Alexandros T [2013] UKSC 70; [2014] 1 Lloyd's Rep 223 at [80], per Lord Clarke. The defamation claims may still proceed to a trial on the merits, although the prospects of that may not be as strong as they were three months ago.

138. It seems to be that the right approach is not to defy reality and conclude that the claims are not pending but to consider how, in the light of the current status of the claims, the discretion under the Lugano Convention and the Recast Regulation should be exercised. It is impossible to predict what course the Ukrainian defamation proceedings will now take. There may or may not be a fully contested trial following a successful appeal, resulting in detailed factual findings about all the above matters. The proceedings may definitively terminate on appeal, or even if the appeal succeeds may be disposed of on a more limited basis, without detailed factual findings.

139. What is of first importance, for the purposes of applying Lugano Article 28 reflexively and/or Recast Article 34, is whether the two sets of proceedings are "related", in the sense of being so closely connected that it is in principle expedient for them to be heard together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

140. Although the wording of Recast Article 34 is slightly different from the wording of both Article 30 (Article 28 of the Brussels Regulation, as it was) and Lugano Article 28, the essence of the test based on expediency of hearing separate proceedings together is the same. To the extent that there are differences in the wording of Article 34, these are spelt out in the separate and different preconditions that must be satisfied where it applies. Assistance as to the application of the "related" and "expedient" tests can be found in cases decided under the previous Brussels Regulation and the Brussels Convention before that.

141. In Sarrio S.A. v Kuwait Investment Authority [1999] A.C. 32, the House of Lords rejected an argument that actions were only "so closely connected that it is expedient to hear and determine them together" within Article 22 of the Brussels Convention where the primary facts necessary to establish a cause of action were the same in both cases. Lord Saville of Newdigate stated:

> "To my mind these wide words are designed to cover a range of circumstances, from cases where the matters before the courts are virtually identical (though not falling within the provisions of Article 21) to cases where although this is not the position, the connection is close enough to make it expedient for them to be heard and determined together to avoid the risk in question. These words are required if "irreconcilable judgments" extends beyond "primary" or "essential" issues, so as to exclude actions which, though theoretically capable of giving rise to conflict, are not sufficiently closely connected to make it expedient for them to be heard and determined together."

His Lordship considered that there should be:

> "…a broad common sense approach as to whether the actions in question are related, bearing in mind the objective of the article,

> applying the simple wide test set out in Article 22 and refraining from an over-sophisticated analysis of the matter."

As a result English proceedings for damages for negligent misrepresentations made in the course of a business sale were stayed in favour of Spanish proceedings for monies due under a put option granted upon the sale of the business. The causes of action were quite different but there was bound to be a substantial factual overlap.

142. In Nomura International Plc v Banca Monte Dei Paschi Di Siena SpA [2013] EWHC 3187 (Comm); [2014] 1 WLR 1584, the Defendant brought proceedings in Italy alleging fraud and collusion against the Claimant and two former directors of the Defendant in relation to a restructuring contract. Later the same day, the Claimant started proceedings in England seeking declaratory relief to the effect that the restructuring agreements were valid and binding on the Defendant. The Defendant applied to stay the English proceedings pursuant to Article 28 of the Brussels Regulation. Eder J. compared the content of the tortious claims in Italy with the declaratory relief as to the effect of the contract sought in the English proceedings and referred to the Sarrio case. He held that the underlying factual issues would give rise to a substantial degree of overlap such that it would be very expedient to hear the two actions together, if possible, to avoid the risk of inconsistent judgments. He rejected an argument that the assessment of expediency depended on what was achievable in practice. As a result, the two sets of proceedings were "related" and the expediency was established. Notwithstanding this, the judge exercised his discretion to refuse a stay, on the basis that the Italian proceedings had been started in breach of an exclusive jurisdiction clause.

143. Relying on these authorities, the Defendants contend that it matters not that the Ukrainian proceedings are a defamation claim and the English proceedings are (essentially) a claim for tortious damages for financial harm caused to the Bank. The focus of the enquiry is whether there is sufficient factual overlap in the separate proceedings to give rise to a risk of different, irreconcilable judgments, such that it would be expedient for them to be heard together. Whether they can in practice be heard together does not prevent a conclusion of expediency, though it may go to the exercise of discretion and – under Recast Article 34 – the additional question of whether a stay is necessary for the proper administration of justice.

144. Although the causes of action in the Ukrainian claim of the First Defendant and the claim of the Bank in the current proceedings are quite different, I am satisfied that there is considerable factual overlap between the allegations made against the Defendants in the Bank's claim and the allegations published by the Ukrainian journal that the First Defendant seeks to challenge as unfounded and defamatory in the Ukrainian proceedings. The general subject-matter is one and the same: a fraudulent scheme to embezzle huge sums of money from the Bank, orchestrated by the First and Second Defendants and making use of a large number of shell companies, including the English and BVI Defendants, to circulate monies and conceal their whereabouts. Key issues that may have to be determined in each claim will be: whether there was a fraudulent scheme; who set it up and operated it; how did it work; what was its purpose; who benefited from the scheme, and how much money was unlawfully removed from the Bank.

145. In my judgment, the claims are "related", within the meaning of Section 9 of the Lugano Convention and the Recast Regulation, being so closely connected in their relevant facts that it is in principle expedient to have a single investigation of the facts to avoid the risk of irreconcilable judgments. The word "related" is not defined in Article 34,

but it is clear in context and in view of the recitals of the Regulation to which I have referred that it is the same principle that applies, and indeed Article 34(a) by its terms effectively so provides. I am not persuaded by the Bank's argument that expediency in this context is to be equated with practicability and that therefore a determining factor is whether under Ukrainian law it will be possible for a claim by the Bank in Ukraine for tortious damages to be heard together with the defamation claim. The aim is not necessarily to secure consolidation of actions (save where a question of declining jurisdiction over a related action arises: e.g., Article 30.2) but to avoid irreconcilable judgments. In some cases, this objective may be as effectively achieved by allowing the proceedings in the court first seised to proceed to judgment, with the related proceedings then following but giving effect as between the parties to binding conclusions of the first court. For that reason, among others, Article 34.2 permits the Member State to continue the proceedings if there is no longer a risk of irreconcilable judgments, or if it is clear that a judgment will not be given by the courts of the third State. Thus, if the appeal in the defamation proceedings were to fail, or the claims be otherwise disposed of on a limited point of law, any stay granted under Article 34 (or by analogy with it) will be lifted. If there were shown to be a real possibility of consolidation of the related proceedings, that would be an additional, strong reason for exercising the discretion in favour of a stay, but it is not a condition of such exercise.

146. So far as the new loans proceedings in Ukraine are concerned, I am not persuaded that these are related proceedings in the required sense of being *so closely connected* that it is expedient that they be tried together. There is a significant number of different types of proceedings relating to the new loans, and their enforceability or validity. In some of these cases it can be said to be implicit that one or both parties is treating either the new loan or the Relevant Loan that was repaid as being valid, but the validity of the Relevant Loans is not an issue to be determined as such in those proceedings. Where the validity of the new loans is an issue, this turns on issues such as the Bank's alleged failure to re-register security in favour of the new borrowers or provide duly certified copies of documents, or the new borrowers' failure to approve addenda to lending agreements. What is really in issue in these proceedings is the validity of the new loans, or surety agreements associated with them. In a large number of other cases, the new borrowers' claims are for declaratory relief and seeking effectively to be subrogated to the Bank's rights against the Ukrainian borrowers. About 150 of these claims had been dismissed, with no appeal, by the time that the without notice hearing took place before Nugee J. It can be said to be implicit in the new borrowers' claims that the Relevant Loans are valid, but there is no issue for the Ukrainian courts to decide. The judgments to date have proceeded on the assumed basis that the Relevant Loan and the new loan were valid. Mr Beketov's opinion is that the judgments do not give rise to any estoppel in Ukrainian law that would preclude the Bank from pursuing a claim in fraud against the Defendants.

147. Although the various different types of new borrower proceedings have some factual connection with the current proceedings, they lack that degree of very close connection in factual or legal subject-matter that would render a single trial expedient. They are concerned principally with the lawfulness of the new loans. It is also very difficult to see how it could be expedient to try the current proceedings together with such an amorphous body of other proceedings of varying types, which are not themselves being conducted as group litigation. In favour of which proceedings exactly would this Court grant a stay, bearing in mind that under Article 34.2 a stay will quite likely not be a permanent stay but only a stay to the extent necessary to ensure that there are not irreconcilable judgments delivered? Moreover, although as a matter of law this is not determinative, the Defendants are not parties to any of the new borrower proceedings in Ukraine. As a matter of English procedural law, therefore, there can be no issue

estoppel arising out of such proceedings that would bind the Bank in the current proceedings. The most that can be said is that the basis on which the Bank defends the new borrower proceedings in Ukraine may provide useful ammunition to the Defendants in the current proceedings, to the extent that the Bank seeks to assert that the Relevant Loans were invalid and were not repaid.

148. This is not a case in which the same issues will be at risk of being decided by different courts where one single decision on the facts is needed to avoid injustice. The multiplicity of new borrower proceedings are not related proceedings for the purpose of Lugano Article 28 or Recast Article 34, but even if they were as a matter of discretion I would not have granted a stay of the current proceedings on that account because of the practical difficulty of identifying the related proceedings on the basis of which the stay would operate. I am also not persuaded that it is necessary for the orderly administration of justice for such a stay to be granted in favour of the new borrower claims.

Exercise of discretion

149. Having held that the First Defendant's defamation claim amounts to "related proceedings", there is a discretion under Lugano Article 28 whether or not to grant a stay of the claims against the First and Second Defendants. For reasons previously advanced, where that article is being applied 'reflexively' in relation to a third State rather than a Convention State, it is material for the Court to consider by analogy the additional requirements of Recast Article 34, as they apply in the case of the English Defendants. This means that I can consider together the application of the First and Second Defendants and the English Defendants for a stay on the basis of the defamation claim.

150. Under Article 34, the next question is whether it is expected that the Ukrainian courts will give a judgment capable of recognition and – where applicable – enforcement in England and Wales. This criterion relates to the recognition and enforceability of a judgment of the third State in principle. The court of the Member State cannot be expected to decide one way or the other whether the court in the third State will in fact give a judgment in future, though the apparent likelihood of its doing so or not doing so would be relevant to the exercise of discretion or the question of whether it was necessary in the interests of the proper administration of justice to grant a stay. At this stage of analysis, however, the question of recognition and enforcement is one of principle.

151. Ukraine being a third State within the terminology of the Recast Regulation, any judgment would not be capable of enforcement under the Brussels-Lugano regime and would only be capable of enforcement in England and Wales at common law. Enforcement is not the true issue here, since the Bank's claim for compensation is not before the Ukraine courts. There is no evidence from the Bank that if a stay of its claim against the English Defendants is granted pending the outcome of the related proceedings in Ukraine it will issue its damages claim in Ukraine, nor in the light of what the Bank is seeking to achieve do I consider it likely that it will do so.

152. The real issue here is one of recognition of judgments. In Airbus Industrie G.I.E. v Patel [1996] I.L.Pr. 465, Colman J. referred to the decision in Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2) [1967] 1 A.C. 853, and observed:

> "It is clear from that case that a foreign judgment, given by a court having jurisdiction, which is final and conclusive and not

> impeachable on any of the grounds which I have previously referred to [fraud, contrary to natural justice or public policy, etc], will be recognised by the English courts in the sense that it may be relied on by a Defendant by way of defence or as giving rise to an estoppel as against the plaintiff. It is also clear that it is of no consequence whether such a judgment or decision is for a quantified money sum or not. Had the underlying basis at common law for the recognition of foreign judgments for defensive purposes been the same as the underlying basis for the *enforcement* of foreign judgments an argument would have been available to the effect that, notwithstanding the total lack of authority on the subject, non-monetary judgments should be enforceable on the same principles as monetary judgments. However, it is clear from the authorities which I have cited that enforceability is based on the creation of a judgment debt which can be sued upon as a separate *in personam* obligation, whereas recognition for the purposes of defence or estoppel is based on the quite different principle of the discouragement in the interests of justice of re-litigation of matters already judicially determined as between the parties."

153. There is no suggestion by the Bank that any judgment from Ukraine would not be recognised by the English court in this way. The Bank focuses on the less attractive enforcement regime for non-Brussels-Lugano judgments, but unless the Bank issues its damages claim in Ukraine no such question of enforcement will arise. It seems most unlikely that it will do so if a stay of the English proceedings is granted while the defamation proceedings continue.

154. The remaining criterion under Recast Article 34 is whether this court is satisfied that a stay is necessary for the proper administration of justice. This overlaps with the discretion implicit in the phrase "the court of the Member State *may* stay the proceedings". In The Alexandros T, the issues related to Articles 27 and 28 of the Brussels Regulation 2001 (now comprised in Recast Articles 29 and 30). Lord Clarke giving the judgment of the majority of the Supreme Court said:

> "In *Owens Bank Ltd v Bracco (2)* Case -129/92 [1994] 1 All ER 336, [1994] QB 509 (Paras 74-79), Advocate-General Lenz identified a number of factors which he thought were relevant to the exercise of the discretion. They can I think briefly be summarised in this way. The circumstances of each case are of particular importance but the aim of art 28 is to avoid parallel proceedings and conflicting decisions. In the case of doubt it would be appropriate to grant a stay. Indeed, he appears to have approved the proposition that there is a strong presumption in favour of the stay. However, he identified three particular factors as being of importance: (1) the extent of the relatedness between the actions and the risk of mutually irreconcilable decisions; (2) the stage reached in the set of proceedings; and (3) the proximity of the courts to the subject matter of the case. In conclusion the Advocate-General said at para 79 that it goes without saying that in the exercise of the discretion regard may be had to the question of which court is in the best position to decide a given question."

Given the separate criterion under Article 34 that a stay is necessary for the proper administration of justice, it may be that there is no such strong presumption of a stay as there is in the case of another Member State where Article 30 applies. Nevertheless, the conclusion that the proceedings are sufficiently closely related to make it expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments does point in the direction of granting a stay, subject to the satisfaction of the other two criteria.

155. On the facts of this case, there is a substantial degree of relatedness between the Bank's claim and the First Defendant's defamation claim, although the causes of action are quite different. The subject–matter of the factual dispute in both cases gives rise to a clear risk of irreconcilable decisions on the questions identified in paragraph 144 above.

156. Had the defamation claim remained pending at first instance, it would have been right to note that the Ukrainian proceedings were further advanced than the Bank's claim in the current proceedings. The expert Ukrainian evidence suggests that the case should ordinarily be dealt with within 120 days, though there can be delays that prevent this time scale from being achieved. Although Mr Beketov says that this time scale is unrealistic, he provides no other reliable time estimate. On the other hand, in the current proceedings the First and Second Defendants have not yet been served and there is no prospect of a trial before 2020. It was therefore very likely that a final judgment on the defamation proceedings in Ukraine would be obtained within a much shorter time scale than a judgment in the current proceedings.

157. However, the dismissal of the defamation claim and the current or intended appeal against that dismissal cast a cloud of uncertainty over the future of the defamation claim, the likelihood of any judgment on the merits of the claim and the timescale for that to happen. Although in principle, according to Mr Beketov, the appeal procedure in Ukraine should be quite quick, previous experience in the defamation proceedings has suggested that, in practice, cases can take a lot longer to be heard on appeal. The appeal may not succeed. If it does succeed, the prospects of a quick resolution of the claim on the merits seem more remote. It may still be more likely, in those circumstances, that a final determination would be obtained before the trial of the Bank's claim in England, but as a result of the appeal there is no longer such a significant difference in timescale; and as a result of the dismissal of the defamation claim there may never be a judgment on the merits.

158. As to the issue of proximity, the issues raised in common by the defamation claim and the current proceedings are almost exclusively concerned with events in Ukraine; the majority of witnesses will be Ukrainian, and Ukrainian law will apply to decide both sets of proceedings. By contrast, none of the harmful acts complained of occurred in England; the matters in issue have no connection with England at all, and the existence of three English defendants is of no materiality. The proximity of the claim to Ukraine therefore points strongly in favour of a stay.

159. The Bank nevertheless argues that a stay would be contrary to the proper administration of justice. It contends that the current proceedings cry out for determination by a truly independent tribunal. But the Bank does not contend that the Ukrainian court is unable to resolve the issues or that it cannot obtain justice in Ukraine. There is no evidence on the basis of which this court can conclude that the Ukrainian courts would not provide justice to the parties. Similarly, there is no evidence before the court that would justify a conclusion that the Ukrainian judiciary is not independent. The Bank complains about how the First Defendant obtained an interim injunction against the Bank and Hogan Lovells on 15th December 2017, without proper process taking place;

but this order was set aside in Ukraine on appeal, demonstrating that justice can be achieved by the Bank.

160. As Lord Clarke observed, the aim of the Lugano and Recast Articles in issue is to avoid parallel proceedings and conflicting decisions. The question of whether a stay is necessary for the proper administration of justice should be considered in that light. It might be said by the Bank that the current proceedings will take so long to come to trial that there is no real risk of mutually irreconcilable decisions, because any decision made in the Ukraine proceedings will be taken account of in the trial in 2020. However, the course that each set of proceedings will take cannot accurately be predicted. There may, for example, be interim applications in the current proceedings that require factual conclusions to be reached at a much earlier stage than a final trial. The proceedings in Ukraine may be further delayed, if the current appeal succeeds, by other interlocutory skirmishes.

161. The argument against a stay would have greater weight if the stay to be granted under Article 34 (or by reference to its principles) were a once and for all decision, but it is clear that it should not be so confined. Under Article 34.2, these proceedings may be continued at any time when it is appropriate to do so, and so potential prejudice to the Bank in granting a stay is thereby limited. If the appeal in Ukraine is dismissed, or if though successful the claim is disposed of without a judgment on the merits, or if the First Defendant does not properly pursue the claim to judgment, the grounds for a continuing stay are likely to fall away.

162. Taking into account all these considerations, even if I had concluded that this Court has jurisdiction to try the First and Second Defendants I would have granted a stay of the claim against them and against the English Defendants for the time being. I would have granted the stay of the claim against the First and Second Defendants under the inherent jurisdiction of this Court or under rule 3.1(2)(f) of the Civil Procedure Rules, by analogy with (or "reflexively applying") Lugano Article 28 but with regard to the considerations identified in Recast Article 34 where a stay is sought in favour of proceedings in a third State. The stay of the claim against the English Defendants is more straightforwardly on the basis of Article 34. In both instances, the stay would not be a final stay of the claims but only a stay while the defamation proceedings in Ukraine remain pending, and subject to review in circumstances such as those identified in Article 34.2, depending on future developments of the claim in Ukraine. The exercise of discretion at a later stage might also depend on whether any further claim had been brought against the First and Second Defendants in the meantime. The stay that I have identified is what is needed on the facts of this case, as matters stand, to achieve the object identified by Lord Clarke. It is, I find, necessary as things stand for the proper administration of justice.

163. My conclusions on the applications for a stay, which I would have reached had I held that the Court has jurisdiction against the First and Second Defendants, apply also so far as the English Defendants are concerned in the light of my decision that the Court has no such jurisdiction. For the reasons given above, the claim against the English Defendants should be stayed under Article 34 for the time being in any event. If the Bank were to pursue the claim against the English Defendants, it would give rise to a risk of conflicting decisions. There is the additional consideration, relevant to the assessment of the proper administration of justice, that if the claim were not stayed it might inhibit the pursuit of any claim brought by the Bank against the First and Second Defendants in Switzerland, where it is entitled to sue them.

VII. Jurisdiction over the BVI Defendants: forum non conveniens

164. The effect of my judgment is that the court has no jurisdiction to try the First and Second Defendants and that the claim against the English Defendants is stayed pending the final determination of the First Defendant's defamation proceedings in Ukraine. Subject to that, it is accepted that the Bank has a good arguable case against the English Defendants and against the BVI Defendants.

165. The Bank obtained permission from Nugee J. without notice to serve the claim form on the BVI Defendants out of the jurisdiction. This was on the basis that there was a good arguable case and a real issue that it was reasonable for the court to try as between the Bank and the English Defendants and that the BVI Defendants were a necessary or proper party to that claim, within para 3.1(3) of Practice Direction B of Part 6 of the Civil Procedure Rules (6BPD). Beyond that, and on the basis of the Judge's conclusions on jurisdiction against the First and Second Defendants and the merits of the claim, he was satisfied that England was the appropriate forum for the trial of the claim against the BVI Defendants. The BVI Defendants challenge those conclusions, though they accept for these purposes that the Bank has a good arguable case in a claim for compensation against the English and BVI Defendants.

166. Were a trial against the First and Second Defendants and the English Defendants proceeding in England, it would plainly be *forum conveniens* for the claim against the BVI Defendants. Equally, on the basis that there will be no trial against the First and Second Defendants and the trial against the English Defendants is stayed, it is difficult to see how or why England would be the appropriate forum for a claim by the Bank against the BVI Defendants alone.

167. If, in due course, the stay of the proceedings against the English Defendants is removed, those proceedings will be heard in England: Owusu v Jackson. The English courts will be the court first seised even if proceedings against the First and Second Defendants or the English Defendants are started in Switzerland or Ukraine. That means that, at some stage, it is theoretically possible (if the Bank considers it worthwhile) for there to be a trial against the English and BVI Defendants in England.

168. The BVI Defendants seek to have service of the claim on them set aside on grounds of:

1. Material non-disclosure in relation to the fraudulent scheme and the extent of the English Defendants' role in it;
2. Non-satisfaction of the gateway in para 3.1(3) of 6BPD, and
3. England being *forum non conveniens*.

169. The duty of full and frank disclosure applies equally to a without notice application for permission to serve a claim out of the jurisdiction, though the factors relevant to an application to serve out of the jurisdiction are only those that relate to the limited inquiry the court performs in determining whether to grant such permission: DSG Retail Limited v Mastercard Inc. [2015] CAT 7 at [44]. In this regard, the reasonableness of the English court trying the claim against the English Defendants depended on their domicile, subject only to a possible stay in favour of pending proceedings in Ukraine. Although originally the English and BVI Defendants relied heavily on non-disclosure of the First Defendant's defamation proceedings in Ukraine, reliance on that head of non-disclosure was abandoned at the hearing. The BVI Defendants still rely on non-disclosure and misrepresentation of the centrality of the role of the English Defendants, which was directly material to jurisdiction to try the First and Second Defendants and to the quantum of the claim against the English Defendants. Since the claim against

the anchor English Defendants was brought on this false basis, with the sole object of removing the First and Second Defendants from the Swiss courts, the basis on which the BVI Defendants are sued and the grant of a freezing order against them can be said to be equally dependent on the false picture presented to the court on the without notice applications.

170. Were the claim against the English Defendants to proceed, the BVI Defendants would be necessary or proper parties to that claim, since they are sued as joint and several tortfeasors for the same loss claimed by the Bank and it is self-evidently appropriate to have one trial of the issues relating to the English and BVI Defendants. I therefore need to consider first whether the gateway for service out of the jurisdiction was satisfied in the circumstances, and if it was whether, in the exercise of discretion, it would be more appropriate to set aside service or to stay the proceedings against the BVI Defendants on the same basis as the claim against the English Defendants is stayed.

171. As to satisfaction of the gateway for service out of the jurisdiction, it is well-established in the context of *forum conveniens* cases that a claim may properly be brought against anchor defendants even if the sole motive for doing so is to establish jurisdiction against foreign defendants: see Altimo Holdings and Investments Ltd v Kyrgyz Mobile Tel Ltd [2011] UKPC 7; [2012] 1WLR 1804 at [76] to [79]. The motive for bringing the proceedings is merely a factor in the exercise of discretion. However, as things stand, it cannot be said that there is between the Bank and the English Defendants a real issue that it is reasonable for the court to try. Given the motive for bringing the claim against them, it is doubtful whether the claim will ever proceed in the absence of a claim against the First and Second Defendants. Moreover, the claim against the English Defendants is stayed. If the appropriateness of that stay is ever revisited, the claim against the BVI Defendants could be reviewed at the same time.

172. So far as *forum conveniens* is concerned, the claim against the First and Second Defendants will not proceed in England. The natural forum for a trial of that claim is Ukraine though, as regards Lugano Convention States, the First and Second Defendants are entitled to be sued in Switzerland. The task of the court in exercising its discretion is to identify the forum in which the case can be suitably tried in the interests of all the parties and for the ends of justice: see Altimo Holdings at [88]. The natural forum is Ukraine, in that all the parties are Ukrainian, almost all the events occurred in Ukraine and Ukrainian law is the governing law. There is no suggestion by any party that they cannot have a fair trial in Ukraine. However, the Bank may not be willing to sue the First and Second Defendants in Ukraine: if it cannot sue them in England it may sue them in Switzerland.

173. In the absence of any valid proceedings against the First and Second Defendants, the natural forum for any claim against the BVI Defendants is Ukraine, though if the claim against the English Defendants were to proceed in England the appropriate forum for a trial would be England. If, on the other hand, a valid claim were issued against the First and Second Defendants, the appropriate forum would be wherever that claim is brought, since the English and BVI Defendants are only ancillary defendants to the real claim against the First and Second Defendants. The reality of these proceedings is that all Defendants should, so far as possible, be sued where the First and Second Defendants are sued. England would only be *forum conveniens* if there were no claim pursued elsewhere against the First and Second Defendants and if the claim against the English Defendants were able to be pursued here.

174. In my judgment, it therefore cannot be said that England is *forum conveniens* for a claim against the BVI Defendants at this time. The theoretical possibility of a claim against

insubstantial defendants being pursued in England should not be allowed to distort the analysis: see *Microsoft Mobile Oy v Sony Europe* [2018] 1All ER (Comm) 419 at [197] – [198]. On the facts of this case, given the motive for suing the English Defendants at all, the claim against them is a factor of very little weight.

175. For all these reasons, the court sets aside service of the claim form on the BVI Defendants and declines jurisdiction against them on grounds of *forum non conveniens*.

VIII. Disposal of the Applications

176. In circumstances in which the court has no jurisdiction against the First and Second Defendants and the BVI Defendants and the claims against the English Defendants are stayed for the reasons given in paras 99-103 above in relation to the sole object of the claim against the English Defendants, and further bearing in mind their lack of any valuable assets, injunctive relief against the English Defendants should not be re-granted. Even if I had reached different conclusions on the jurisdiction and stay issues, I would as a matter of discretion have declined to re-grant a worldwide freezing order up to US$515m plus interest in view of the serious non-disclosure and misrepresentation that led to the grant of such an order up to US$2.6 billion in December 2017.

177. Accordingly, on the English Defendants' application dated 16 February 2018, the freezing orders made by Nugee J. and Roth J. must be set aside and the Bank's claim against the English Defendants will be stayed. On the BVI Defendants' application dated 16 February 2018, service of the claim form on them and the freezing orders made by Nugee J. and Roth J. will be set aside. No further substantive order is required on the English and BVI Defendants' applications dated 2 March 2018. On the First and Second Defendants' applications dated 9 March 2018, there will be a declaration that they may not be sued in England under Article 6 of the Lugano Convention in relation to the claims advanced in the claim form; the claim against them will be struck out and the freezing orders made by Nugee J. and Roth J. will be set aside.